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No. 110] NEW DELHI, FRIDAY, MAY 14, 1954

ELECTION COMMISSION

NOTIFICATION

New Delhi, the 30th April, 1954

S.R.O. 1609.—Whereas the election of Shri Dinabandhu Sahu, as a member of the Legislative Assembly of the State of Orissa, from the Kendrapara constituency of that Assembly, has been called in question by an Election Petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Jadumoni Mangraj, S/o Shri Bhikari Charan Mangraj, Village & P.O. Karilopatna, District Cuttack;

And whereas the Election Tribunal appointed by the Election Commission in pursuance of the provisions of Section 86 of the said Act, for the trial of the said Election Petition has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its Order to the Commission;

Now, therefore, in pursuance of the provisions of Section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

BEFORE THE ELECTION TRIBUNAL, CUTTACK

PRESENT:

Sri N. C. Ganguli, Chairman.

Sri R. C. Mitra and Sri K. D. Chatterji, Members.

The 16th November, 1953

ELECTION CASE No. 4 OF 1952

ELECTION PETITION No. 99 OF 1952

Jadumani Mangraj, son of Bhikari Charan Mangraj of Karilopatna, P. S. Patkura, P.O. Karilopatna, District Cuttack—Petitioner.

Versus

1. **Dinabandhu Sahu, son of Suban Sahu of village Mirapatna, P. S. Kendrapara, P.O. Kendrapara, District Cuttack.**
2. **Sarojkanta Kanungo, son of Radhakanta Kanungo of Bhagabatpur P. S. Kendrapara, P.O. Bhagabatpur, District Cuttack.**
3. **Lokanath Das, son of Jovram Das Shamasundarpur, P. S. Kendrapara, P.O. Kantia, District Cuttack—Respondents.**

Plcader for the Petitioner, Sri A. K. Das, Sri S. K. Roy, Sri B. M. Das and Sri M. N. Das, Advocates.

Pleader for the Respondent No. 1, Sri A. Das, Sri S. Mahanty, Sri L. K. Dasgupta, Sri B. K. Pal, Sri G. N. Sengupta, and Sri C. M. Acharya, Advocates.

N. C. Gunguli, *Chairman.*

K. D. Chatterji, *Member.*

This is a petition for setting aside the election of Respondent No. 1 from the Kendrapara Constituency to the Orissa Legislative Assembly or for a declaration that the election is wholly void and in the alternative for a declaration that the petitioner is the duly elected candidate from the constituency. Out of the three respondents Respondent No. 3 withdrew from the election. The contest was between the petitioner, Respondent No. 1 and Respondent No. 2. The allegations of the petitioner are as follows:—

That the Respondent No. 1 committed the corrupt practice of bribery by inducing Respondent No. 3 to withdraw from the election upon a promise of a job in the Grow More Food Department. Respondent No. 1 is alleged to have been instrumental in causing the management of the Aul Estate to be taken over by the Court of Wards and the employees of the Court of Wards including one Padma Charan Mohanty, Sub Manager of the Derabisi Circle did active propaganda for him in the election. Choudhury Balabhadra Prasad Das, Manager of the Orissa Road Transport Company is alleged to have actively canvassed for respondent No. 1. Four other persons, alleged to be Government servants and named in the list of particulars are said to have actively canvassed for Respondent No. 1. They are Indramoni Misra, Branch Post Master of Danpur Post Office, Padma Charan Thatoi, Branch Post Master of Tilotamadeipur Post Office, Gopinath Misra, Auditor, Kendrapara Central Co-operative Bank and Gourishyam Mohanty of the Canal Revenue Department. It is further alleged that many of the Presidents of the Chaukidari Unions, of whom four are named in the list of particulars, and Dafadars and Choukidars under them, canvassed for Respondent No. 1. Respondent No. 1 is further alleged to have, in contravention of Section 123(6), used motor cars, motor buses, jeeps and numerous bullock carts for the transport of voters to various booths. Respondent No. 1 circulated a pamphlet "Mangaraj Babu O Congress" containing false statements in relation to the petitioner's personal character and conduct and in relation to his candidature. It is also said that Respondent No. 1 held out false promises to the voters for excavating irrigation canals and thereby inducing large number of voters to vote for him. He is further alleged to have caused, for the purpose of securing votes, the District and local Boards to grant stipends, grants etc. to various schools and also for the same purpose made personal contributions to various schools. Lastly, it is alleged that he provided voters with cooked food near three booths.

The Respondent No. 1 in his written statement has denied each and every allegation of the petition. He has further raised some points of law in his written statement regarding the maintainability of the petition which will be dealt with under the appropriate issues. A petition of recrimination has been filed by him making various allegations of corrupt practices against the petitioner out of which it is only necessary to refer to two because others were not pressed at the hearing. It is said that in his election propaganda the petitioner who is a Khandayat by caste made a systematic appeal on the ground of caste, asking the Khandayat voters to vote for him. The second allegation is that he attempted to induce a belief in Respondent No. 1 that he (Respondent No. 1) will be the object of divine displeasure if he did not withdraw from the election.

Upon the allegations in the petition filed by the petitioner and the petition of recrimination filed by Respondent No. 1 the following issues as suggested by the parties were framed.

ISSUES

1. Is the petition maintainable according to law?
2. Is the petition liable to be dismissed having contravened Section 81 of the Representation of the people Act, 1951?
3. Had the Election Commission jurisdiction to condone the delay? If so, did it exercise jurisdiction illegally?
4. Is the petition barred by limitation under Section 81 of the R. P. Act and liable to be dismissed under section 90(4) of the R. P. Act?
5. Did the petition contravene section 83 of the Representation of the People Act?
6. Had the Election Commission jurisdiction to allow the petitioner to correct the verification?
7. Is the petition legally verified, if not, is it liable to be dismissed under section 90(4) of the R. P. Act?

8. Is the petition liable to be dismissed for not giving the full particulars of the alleged corrupt or illegal practice mentioned in the petition?
9. Is the petitioner entitled to maintain the petition in view of his having incurred disqualification as per Extraordinary Gazette Notification No. 2984/Elec., dated 14th June 1952, as published in the Extraordinary Gazette of 10th July, 1952?
10. Was the petitioner duly nominated?
11. Did the Respondent promise or offer to respondent No. 3 an employment in the Grow More Food Department and did the latter withdraw or refrain from standing as a candidate at the election?
12. Has not the election, so far as respondent No. 1, been a free election and is it liable to be declared void?
13. Did any corrupt practice of bribing or undue influence prevail in the election of this Respondent No. 1 as alleged by the petitioner?
14. Has the election of this respondent No. 1 been materially affected by the alleged corrupt practices?
15. Has this respondent failed to file return of his election expenses in accordance with Rule 112 of the Representation of the People Act (Rules) 1951 within time?
16. Did the account contravene any rule as alleged?
17. Did the respondent No. 1 move the appropriate authority for causing the management of the Aul Estate to vest in the Court of Wards?
18. Did the Sub Manager of Aul Court of Wards Estate directly or indirectly interfere or attempt to interfere with the free exercise of the electoral right of the voters? If so, was it with the knowledge, consent, approval or connivance of this respondent or of the Congress party as alleged in the petition?
19. Did Choudhury Balabhadra Prasad Das take part in the election of this respondent No. 1? If so, was it with the knowledge, consent or approval of this respondent No. 1?
20. Was Choudhury Balabhadra Prasad Das, Manager of the Government Transport Service?
21. Did any Government Servant take part in the election work of this respondent No. 1 at his instance or connivance or with the connivance of Congress Government or Congress party as alleged in the petition?
22. Did any Union President or Daffadar or Choukidar take any part in the election on behalf of this respondent No. 1 in furtherance of prospect of election as alleged?
23. Is Padmacharan Thatoi, a Government servant? Did he render any assistance to this respondent for furtherance of this prospect of his election?
24. Did this respondent use any vehicle or bullock carts for carrying any voters to or from the polling booths?
25. Did this respondent publish or caused to be published and broadcast among the electors the booklet called "Mangaraj Babu O Congress"?
26. Were the impugned statements or any of them false? Did this respondent believe them to be false or did not believe them to be true as alleged by the petitioner? Were they or any of them reasonably calculated to prejudice the petitioner's election?
27. Did the statements or any of them relate to the personal character or conduct of the petitioner or in relation to his candidature?
28. Did this respondent give out any promise for laying out irrigation channel before the electors as alleged?
29. Did any officer in the P.W.D. in irrigation or agricultural department go to the locality to make a show of starting the alleged construction? If so, was it done to help and further the cause of election of this respondent?
30. Did the Chairman, or Vice-Chairman or any other officer of the District Board collude with this respondent No. 1? Did they or any one of them award grant or stipend or increment of salary to Primary school or its teachers at the instance of this respondent?

31. Did this respondent make any personal cash contribution to any such institution?
32. Is the petitioner competent to be declared duly elected on account of his disqualification stated above?
33. Is the petitioner's election a free election?
34. Is the petitioner's election void on account of the corrupt and illegal practices prevailing extensively in his election as alleged in the recrimination?
35. Were not the statements contained in the pamphlet "Odisi Congress Ku Mangarajar Jawab" set forth in the recrimination false and believed to be false by the petitioner or not believed to be true by the petitioner and did they not relate to the personal character and conduct of the respondent No. 1 and in relation to his candidature and were they not reasonably calculated to prejudice the respondent's prospect of election?
36. Is not the petitioner's election void on account of undue influence caused on this respondent No. 1 to make him withdraw from his candidature as contained in the pamphlet "Odisi Congress Ku Mangarajar Jawab"?
37. Is not the petitioner's election void on account of the systematic appeal to vote on the grounds of caste or community as alleged in the recrimination?
38. Is the election of the Respondent No. 1 liable to be declared void?
39. Did the petitioner submit his accounts according to the rules of the Representation of the People Act?
40. To what relief, if any, the petitioner is entitled?

FINDINGS

Issues 1 to 8.—These issues relate to the question whether the petition should be tried upon its merits at all, the contention of the Respondent No. 1 being that the Tribunal has no option but to dismiss the petition for non-compliance with sections 81 and 83 of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act'). Consequently we allowed these preliminary issues to be heard first. By order No. 43, dated 13th March 1953, we rejected the contentions put forward on behalf of the Respondent No. 1 and the trial proceeded. We now proceed to give our reasons for the decision on the preliminary issues.

The contentions of Respondent No. 1 are mainly two:—

(a) The petition is barred by limitation.

(b) The petition not being properly verified there is in the eye of the law no valid petition to be tried.

There is a further ground urged although not taken in the written statement, that the petition was not signed when it was presented.

On the question of limitation the position is as follows:—

The petition was despatched by registered post on the 3rd April, 1952 and was received in the office of the Election Commission on the 5th April, 1952. It is conceded that the last date of "presentation" was the 4th April, 1952 that being the date of expiry of 14 days from the date of publication of the notice that the return of election expenses has been lodged by the returned candidate [Rules 118 and 119 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951]. Under the proviso to Section 85 of the Act the Election Commission has power to condone the delay. The proviso runs thus:—"Provided that if a person making the petition satisfies the Election Commission that sufficient cause existed for his failure to present the petition within the period prescribed there for, the Election Commission may in its discretion condone such failure." Acting under the proviso the Commission has condoned the delay.

It has been urged that the condonation by the Election Commission in the present case was without jurisdiction. The ground for this contention is that under the proviso the Commission has jurisdiction to condone the delay only when the petitioner personally satisfies the Election Commission that there was sufficient cause for delay. Admittedly the petitioner did not appear in person before the Commission nor did he make any representation for condonation. It is argued, therefore, that the foundation of the exercise of discretion by the Commission is lacking. We are unable to accede to this contention. A person may satisfy another person or authority about something although he may never appear

personally before that person or authority. He may satisfy him through another person or indeed without any kind of representation at all. Take an extreme case. A person sends an election petition by post well within time to reach the Commission's office in the ordinary course before the last date of presentation. But the petition is delayed on account of dislocation of Postal Communication due to widespread riots or civil commotion. The Commission on receipt of the petition is manifestly satisfied that there were reasons for delay. Is it necessary for the Commission to require the petitioner to appear before it to satisfy it upon an obvious matter? Or can it be said that because the petitioner did not appear personally he did not satisfy the commission that there was sufficient cause for delay? If the Respondent's contention is right, in all such cases the petition shall be rejected, for Section 85 is in mandatory terms. We do not think therefore that the foundation for the exercise of the discretion is a personal representation by the petitioner.

It has been urged by the petitioner that the presentation of the petition was not in fact out of time. Under Section 81 (2) "An election petition shall be deemed to have been presented to the Election Commission—

- (b) When it is sent by registered post and is delivered to the Secretary to the Commission or the Officer so appointed".

It is to be noticed that clause (b) refers to two points of time, the time of despatch and the time of delivery. In the chronological sense, therefore, there is an obvious anomaly in the way the explanation has been drafted. The petitioner urges that it really refers to one point of time, namely, the moment of despatch and the words "and is delivered" merely signify that the fact of delivery is an essential condition. In other words according to the petitioner the true intention can be gathered if clause (b) is paragraphed thus:—"When it is sent by registered post, provided it is delivered to the Secretary to the Commission or the Officer so appointed". The Respondent No. 1, however, contends that the word "when" governs not only the words "it is sent by registered post" but also the words that follow namely "and is delivered". In other words Counsel for Respondent No. 1 would paraphrase the clause thus:—"When it is sent by registered post and when it is delivered to the Secretary." We have no hesitation in accepting the former in preference to the latter construction. The former would obviate the manifest anomaly of prescribing two points of time in respect of the same thing. There is nothing improper or unjust or absurd in selecting the moment of despatch as the determining factor where a specific point of time is to be selected in relation to the transmission of communication. For instance in the Contract Act the moment of despatch by post of a communication of acceptance of a proposal is selected as the decisive factor in the completion of a contract so far as the proposer is concerned (See Section 4). We are of opinion, therefore, that the reference to delivery in Clause (b) does no more than signify a condition for presentation of a petition. If the legislature has really intended that the time of delivery should be the decisive factor it is for the legislature to make a suitable amendment. For reasons stated above we do not think that the petition ought to be dismissed on the ground of limitation under Section 90(4) of the Act.

Under Section 83 of the Act the petition and the list of particulars shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure. The relevant provision of the C.P.C. is Order 6 Rule 15 which lays down that the person verifying shall with reference to the number of the paragraphs state which facts are true to his knowledge and which are true to his information which he believes to be true. In this case the petitioner verified the petition and the accompanying list in these terms—"I Jadumnni Mangaraj, petitioner, do hereby affirm and state that the facts stated above are true to the best of my information and belief". The objection taken is that it has not been stated which of the paragraphs are true to his knowledge and which are true to his information. It is to be noticed, however, that Order 6 Rule 15 does not require that a person signing the verification shall state that some facts are true to his knowledge and others are true to his information. A person can verify the entire facts as being true either to his knowledge or his information. If the verification is based both upon knowledge and information the rule requires that the person verifying shall state which facts are based upon his knowledge and information respectively.

The verification was, however, amended on 24th July 1952 and there is no question now that the verification is not in compliance with the C. P. C. So far as this amendment is concerned it appears that the Election Commission considered the original verification as defective and drew the attention of the petitioner to the irregularity by its letter, dated 3rd July 1952. The Commission

wrote to the petitioner to seek permission of the Tribunal to amend the verification. On 24th July, 1952, the Chairman of the Tribunal, exercising all the functions of the Tribunal under Section 86(5), allowed the amendment.

Upon the facts as stated above two contentions have been raised on behalf of Respondent No. 1, Firstly, that the verification being defective and having been found to be defective by the Commission the petition should have been dismissed automatically under Section 85 of the Act and could not proceed to trial, and, Secondly, that the Tribunal had no jurisdiction to allow the amendment so as to bring into existence a good and valid petition when there was none properly referred to it for trial.

It was not seriously disputed that if we have the power of allowing the amendment there are no good grounds for dismissing the petition by exercising our powers under Section 90(4). The proposition that defects in verification are mere irregularities that ordinarily ought to be cured by amendment is too well established and has not been seriously questioned [See 17 Calcutta 580 (P. C.), 18 Allahabad 396 (F.B.) and 54 Allahabad 57 (F.B.).] But it is contended that we have no such power. It is said that although under Section 90 the Tribunal has to try a petition in accordance with the procedure applicable under the C.P.C., the powers are to be strictly confined within the meaning of Section 92. The argument is reinforced by a reference to Section 83(3) which refers specifically to the power of allowing amendment of the list of particulars. It is therefore argued that when the power of allowing amendment is specifically confined in respect of one matter it is excluded in respect of other matters. It is further urged that in view of the provisions referred to above and also in view of Section 85 which is mandatory and would automatically entail dismissal of a petition (with the consequence that the petition should never go to trial) the apparent discretion under Section 90(4) to dismiss or not to dismiss a petition does not in reality amount to any discretion at all, and that the word "may" in Section 90(4) means, in the context, "shall". Reference in this connection has been made to Craies on Statute Law (5th Edition) at page 264 and to *Alcock Ashdown and Co. Vs. Chief Revenue Authority, Bombay* (50 I. A. 227) and *Re. Neath and Brecon Railway* (9 Ch. Appl. 263). It is unnecessary to examine the proposition, that when the legislature empowers or enables an authority to do a thing there may be cases where, with reference to the nature of the duty for the performance of which the power is conferred, it is obligatory, in certain circumstances, for the authority to exercise that power. But there can be no doubt that a discretion conferred is ordinarily to be exercised in accordance with the judgment of the authority concerned as to the desirability of exercising or not exercising that power. There can be no doubt also that in the present case the legislature has conferred upon the Tribunal a discretion and has not imposed an obligation. The deliberate use of the word "may" in Section 90(4) in contradistinction to the word "shall" in Section 85 is intended to leave to the Tribunal's discretion the exercise of the power conferred by Section 90(4). It is needless to discuss the principle or the authorities any further in view of the recent decision of the Bombay High Court in *Sitaram Hirachand Birla Vs. Yograj Singh* 1953 Bombay 293. In that case the petition lodged with the Election Commission was admittedly improperly verified. The returned candidate filed an application in the High Court for a writ for requiring the Election Tribunal to dismiss the petition under Section 90(4). It was urged that the Tribunal had no option but to dismiss the petition and that it had no power to allow amendment. Both the contentions were negatived. The learned Chief Justice observed—

"It will be immediately apparent that whereas in Section 85 dealing with the Election Commission the Legislature has used the expression "shall dismiss" in Section 90(4) the Legislature has used the expression "may dismiss". It is obvious therefore that no obligation is cast upon the Tribunal under Section 90(4) to dismiss an Election Petition which does not comply with the provisions of Section 83. Mr. Patwardhan asks us to construe "may" as "shall" and he says that there is no reason why the same obligation should not be cast upon the Tribunal as has been cast upon the Commission. When we find in the same statute with regard to the same subject matter the Legislature using in one case the expression "shall" and in the other case "may", it is impossible to hold that these two expressions were used with the same meaning and connotation. The Legislature obviously wanted to make a distinction between these two expressions, and therefore whereas in the one case the Legislature wanted to cast an obligation upon the Commission to dismiss the petition, in the other case the Legislature has given a discretion to the Tribunal whether to dismiss

or not to dismiss the petition. Therefore, in our opinion, there is no statutory obligation upon the Tribunal to dismiss a petition which does not comply with the provisions of section 83".

With regard to the power of amendment the learned Chief Justice observed—

"Therefore the power conferred upon the Tribunal to try a petition in accordance to the procedure applicable in the Code of Civil Procedure is a power much wider than merely applying procedure which would be applicable to the hearing of a suit".

The decision is on all fours with the present case and we respectfully agree with Their Lordships reasonings.

The objection that the petition was not signed is grounded upon the fact that the petition when presented contained only one signature which appeared after the verification. According to the contention of Respondent No. 1 there should have been a signature at the bottom of the body of the petition before the verification portion. In other words it is argued that although the verification was signed there was no execution of the petition itself. Under Section 83(1) the petition is to be signed and under Section 83(2) the verification also has to be signed in accordance with the requirements of the C.P.C. Order 6, Rule 14 of the C.P.C. requires pleadings to be signed and Order 6, Rule 15 to which reference has already been made requires the verification to be signed. It is argued that these being two independent statutory requirements they can be fulfilled in only one way that is by two different signatures. The argument involves the assumption that two statutory requirements can never be fulfilled by a single act. We do not accept the assumption as correct. What we have to see is what, in substance, constitutes execution of a document. When a man subscribes his signature to any part of a document with the intention of executing it this is sufficient execution. A form of declaration is appended to many documents e.g. an Income Tax Return, which is required by law to be signed. The signature on the declaration is a signature in respect of all the statements in the document. We think that a signature to a declaration at the foot of a document constitutes sufficient execution of the document as a whole.

We hold therefore that the petition referred to this Tribunal was not a void petition and that any irregularity in the verification has been properly cured by amendment and that this Tribunal has jurisdiction to allow the amendment. We further hold that the petition is not barred by limitation. These issues are answered accordingly.

Issue No. 23.—This issue is confined to the question of alleged assistance from Padmacharan Thatoi who is admittedly an Extra Departmental Agent and works as the Branch Post Master of Tilotamadipur Branch Post Office. In the petition there is also an allegation of assistance from another Extra Departmental Agent, Indramoni Misra who is the Branch Post Master of Danpur Branch Post Office. No separate issue, however, was framed in respect of Indramoni Misra although his case would be governed by issue No. 21. We therefore take the two instances together.

The questions that have to be decided are two:—

- (a) Whether Extra Departmental Agents are persons serving under the Government of India within the meaning of Section 123(8) of the Act?
- (b) Whether the two persons named above rendered any assistance to the Respondent No. 1?

As regards the first question considerable arguments have been advanced by both sides. Two things, however, appear to be clear; firstly, that Extra Departmental Agents constitute a special class, in many respects different from the ordinary departmental employees, and, secondly, that their status will depend upon broad considerations of their relationship with the Postal Department rather than their nomenclature. Sri Ashok Das for Respondent No. 1, relying upon the special factors that make Extra Departmental Agents a class by themselves has urged that they are not servants at all. According to him the relationship is one of principal and agent and not that of master and servant. An Extra Departmental Agent is a person who is not required to give up his ordinary avocations. In fact persons who have other avocations and have independent means are to be appointed as Extra Departmental Agents. Rule 284 of Volume IV of the Posts and Telegraphs Manual says "Whenever possible, branch offices should be placed in charge of Extra Departmental Agents, such as School Masters,

Station Masters, Shopkeepers, land holders and pensioned servants of government who have source of income apart from allowances for postal work". It is also pointed out by Sri Ashok Das that he has no fixity of time and place of work, that he does not get regular pay but only an allowance, that he has the power of delegating his functions to a substitute when he is not working, that he is free to do whatever he likes when he is not actually doing postal work. These features according to him are not consistent with the relationship of master and servant but really constitute an agency. He has of course laid emphasis on the word "agent" in their description. Our attention has not been drawn to specific rules of the Postal Department from which the incidents described above can be clearly inferred. For instance it is by no means clear whether Extra Departmental Agents can, without reference to the department, appoint in their place whoever and whenever they like. On the contrary the note appended to Rule 284 of Volume IV of the Post & Telegraph Manual says that arrangement for appointment of another Extra Departmental Post Master, presumably by the department, is to be made when an Extra Departmental Agent is ill or temporarily absent. But on the other hand P.W. 1 who is an Inspector of Post Offices states that Extra Departmental Agents make their own arrangement when they go on leave. It is not clear, therefore, whether the supposed power of delegation is unfettered as Sri Ashok Das suggests.

However that may be the main thing to be determined is whether the special factors, which make E.D.As. a class apart, constitute an agency as distinguished from service. The essential distinction between the relationship of master and servant and that of agent and principal is well settled. A servant is a person who has not only undertaken to do what is required by his master but to render complete obedience and to carry out all orders as to the manner of performing his duty. A master not only has the power to order his servant what to do but also how to do it. An agent however, although certainly required to do specified things has discretion as regards the manner of doing them. A servant takes orders and is subject to the discipline and control imposed upon him by his master. In other words a servant is under the complete control of his master as to his conduct whereas an agent's conduct is free from control. An agent may by his contract undertake to do things in a certain manner but an agent never contracts to be subject to the discipline and control imposed by his principal. A number of authorities have been cited laying down this essential distinction. But it is enough to refer to the succinct observation of Bramwell, B. in *R. Vs. Walker* (1858) 27 L.J. Com. Law, page 207—"A principal has the right to direct what the agent has to do, a master has not only that right but also the right to say how it is to be done".

What then is the result of this test applied to persons in the situation of Extra Departmental Agents? Section 2, clause (e) of the Indian Post Office Act, 1898 defines "Officers of the Post Office" as including "Any person employed in any business of the Post Office or on behalf of the Post Office". The postal service is an exclusive privilege of the Government (Section 4). This privilege is exercised through a government department and the control of the department is vested in the Director General of Posts and Telegraphs functioning under the control of the Department of Communication (Rule 2, Volume II, Post and Telegraph Manual). These functions are carried out by officers of the Post Office as defined in Section 2, clause (e). The functions of the Extra Departmental Agents are exactly the same as any other "business of the Post Office" that other employees carry on. *Prime facie* therefore they are "persons employed in any business of the Post Office" within the meaning of Section 2(e). The regulations framed which are contained in the Post and Telegraph Manual are applicable to all officers of the Post Office in discharge of their functions.

As regards the general regulations applicable to all Postal Employees there is no suggestion that Extra Departmental Agents stand outside these regulations. There can be no doubt that the copious and detailed regulations regulating the discipline of and control over Postal employees apply to Extra Departmental Agents also. In the Indian Post Office Act itself there is a chapter on penalties and procedure (Chapter X), the first part of which relates to "offences by officers of the Post Office" (Sections 49 to 57). Under Section 49 if a person employed to carry or deliver mail is intoxicated or is guilty of carelessness or loiters while on duty he is punishable. Under Section 50 withdrawal from duty without permission is punishable. Similarly there is punishment for making false entry in register (Section 51), for theft or misappropriation (Section 52), for opening, detaining or delaying postal articles (Section 53), for fraud in connection with official marks (Section 54), for fraud in connection with Post Office documents (Section 55), for sending unpaid postal articles (Section 56). Any of these acts committed by an officer of the Post Office is made a special offence

although it is to be noticed that most of these would be punishable under the Indian Penal Code if committed by any other person. There can be no doubt that those acts if committed by Extra Departmental Agents would be punishable under this chapter. Take Section 50 for instance, which says that whoever being employed to carry or deliver any postal articles withdraws from the duties of his office without permission shall be punishable with imprisonment which may extend to one month. Can it be said that an Extra Departmental Agent is not punishable under Section 50? He would certainly be clearly within the terms of the Section. An agent who is not under the control of his principal at all would not be so liable. That all Branch Post Masters (departmental or extra-departmental) are considered officers performing executive duties is clear from Post & Telegraph Manual, Volume II, Rule 7(b), clause (v) under the heading "Executive Staff". The sub-rule read thus—"7(b). Under each head of a circle there are the following classes of officers who assist him in the general administration of the circle and perform executive duties:

I. Postal branch including R.M.S.

(b) Executive staff.

(v) Branch Post Masters.

Then follows a complete chapter on discipline (Chapter II, Sections 11 to 108A). There is no reason, and nothing has been suggested affording a reason, to hold these regulations for discipline are not applicable to Extra-departmental Agents at all. These regulations in Chapter II lay down rules for punishments, procedure for punishment, resignation, dismissals, punishment for desertion and incompetency etc. These disciplinary regulations apply to all without exception. It cannot be suggested that Extra-departmental Agents stand outside these regulations. In fact they are expressly mentioned in one place, Rule 12A(2), which says that punishing authorities shall in the case of Extra Departmental Post Masters, Postman, etc. be same as for departmental Post Master, Postmen, etc. This shows clearly that Extra-departmental Agents are amenable to the discipline of the department and are punishable by the same authorities and in the same manner as the departmental employees.

If the appointment of Extra-departmental Agents is really the making of a contract of agency one would expect such contracts to be dealt with in the regulations relating to contract contained in the Posts and Telegraphs Manual. All contracts by the Postal Department are governed by an elaborate set of rules. There is a special chapter on contracts in Volume II of the Post & Telegraph Manual (Chapter IX). The reason why the relationship between the department and Extra-departmental Agents are not guided by separate rules regarding contract is that they are subject to all the rules and regulations which generally apply to postal servants. The fact that in some places they are specially mentioned in contradistinction to other similar employees does not mean that they are not governed by the general regulations framed for all officers of the Post Office.

Only one decision regarding the position of Extra-departmental Agents has been brought to our notice and it is published in the *Gazette of India Extraordinary* (No. 161), dated 19th June, 1953. This is a decision of the Election Tribunal of Himachal Pradesh in Election Petition No. 14 of 1952 where two members have held that Extra-departmental Agents are not persons serving under the government whereas another member Sri Daulatram Prem has in his dissenting judgment held that they are. The majority judgment has laid stress on the fact that Extra-departmental Agents are appointed from among school masters, shopkeepers etc., that they are persons of independent means, that they are excluded from the operations of the Civil Service Rules, that they have no claim to any permanent appointment or promotion etc. With great respect we do not think that these factors are sufficient criteria for determining the essential question, namely the control and discipline to which Extra-departmental Agents are subject and which is inconsistent with agency. The real criterion is in our opinion been ably analysed by Sri Daulatram Prem in his dissenting judgment and we agree with his conclusion that the elements of control inherent in the relationship is foreign to agency. Our conclusion is that Extra-departmental Agents are persons serving the Government of India in the Postal Department although they are a different class from other postal servants.

With regard to Padma Charan Thatoi it is admitted that he acted as a polling agent of Respondent No. 1, but it is further alleged that he canvassed for him. Sri Ashok Das for the Respondent No. 1 has urged that acting as polling agent does not constitute assistance within the meaning of Section 123(8) of the Act. We have no hesitation in repelling this contention although it is supported by the majority judgment of the Himachal Pradesh Tribunal. In election case No. 5 of 1952 decided

by us we held that the act of proposing or seconding nomination papers constitutes assistance. *A fortiori* acting as polling agent amounts to rendering assistance. It is not necessary to give elaborate reasons because it is clear that a polling agent looks after the interest of the candidate and whatever he does is certainly assistance rendered. It is urged that assuming that Padmanabha Thatoi is a person serving under the Government of India he was on leave from the 26th December 1951 to the 16th January 1952 and had given a substitute to work as an Extra Departmental Agent and consequently at that time he was not a government servant. If he was a government servant he does not cease to be so by taking leave. There is no substance in this contention.

As regards canvassing by him P.Ws. 11, 14, 16 and 17 have said that he canvassed for Respondent No. 1. R.W. 15, 23 and 46 (Padmalabha himself) denied it. We are inclined to believe the evidence of the petitioner's witnesses on this point. Admittedly he is interested in respondent No. 1 as his polling agent and it is significant that he had taken leave just upto the end of the polling period. We are not impressed by the respondent No. 1's witnesses on this point and accordingly find that Padmanabha Thatoi canvassed for respondent No. 1.

We come next to the allegation of canvassing by Indramani Mishra, who is admittedly a Branch Post Master of Danpur Post Office. P.Ws. 30, 31, 32, 37, 41, 53, 54 and 60 said that Indramani (R.W. 6) canvassed for respondent No. 1. Indramani (R.W. 6), R.Ws. 12, 25, 26, 30, 55 and 57 denied the same. It was urged that R.W. 6 is not a truthful witness as he spoke falsely that there was only one meeting at Chandol which he attended though from the other witnesses examined on behalf of respondent No. 1 it is found that he attended more than one meeting and addressed one of the meetings there. He (R.W. 6) said that his mother is 60 years' old and she walked to the Dohali booth which is $1\frac{1}{2}$ miles from his house. It was urged that it is unusual for such an old lady to walk to the booth and he (R.W. 6) would not have taken his mother to the booth unless he was greatly interested in respondent No. 1. It was urged that no reliance should be placed on R.W. 12 as he was a worker of respondent No. 1 but falsely denied it. R.Ws. 12 and 40 are son and father respectively and they falsely said that respondent No. 1 did not go to their village though respondent No. 1 himself (R.W. 57) admitted that he had been to their village. R.W. 25 admitted that Indramani (R.W. 6) is a Tahsil Panchayet. It was suggested to him that he is a professional witness. R.W. 26 said that he presided over one of the meetings of the petitioner but it is curious that he comes as a witness for the respondent No. 1. R.W. 30 admitted that he does not know Indramani but still he said that Indramani (R.W. 6) did not canvass for respondent No. 1. P.W. 54 said that Indramani Misra (R.W. 6) canvassed for respondent No. 1 but he was not cross-examined on the point. Indramani (R.W. 6) did not impress us as a truthful witness and he betrays obvious anxiety to show that the Chandol meeting (which he attended, and where, respondent No. 1 admits he might have met him) was not held on behalf of respondent No. 1. The circumstances show that it was unlikely that as an Extra-departmental Agent he would have been considered objectionable as a canvasser, since another Extra-departmental Agent was admittedly engaged as polling agent. The evidence as it stands shows that Indramani Mishra (R.W. 6) canvassed for respondent No. 1.

This issue is accordingly decided in favour of the petitioner.

Issue No. 22.—This issue is framed upon the allegations in the petition that certain Presidents of Chaukidari Union have rendered assistance to the Respondent No. 1 in his election. A point of law is raised in the hearing which is not raised in the pleading or in the issues that even if the Presidents named in the petition canvassed or worked for the Respondent No. 1 in the election it will not amount to a corrupt practice as such Presidents are not persons serving under the State of Orissa within the meaning of clause 8 of Section 123 read with paragraph (b) of the Explanation. If it is held that Union Presidents do not come under clause 8 it will be unnecessary to decide the issue as framed namely whether they rendered any assistance to Respondent No. 1.

We, therefore, proceed to determine whether Union Presidents are governed by paragraph (b) of the Explanation to Section 123(8). It is necessary to make it clear at the outset that counsel for both parties agree that Presidents as such are not persons serving under the State. The petitioner's contention is that a President shall be deemed to be a person serving under the State because under paragraph (b) of the explanation he is either a village headman or a village officer.

It is necessary here to reproduce clause 8 of Section 123 which reads as follows:—

- "123. (8) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person with the connivance of a candidate or his agent, any assistance for the furtherance of the prospects of the candidates' election from any person serving under the Government of India or the Government of any State other than the giving of vote by such person.

Explanation.—For the purpose of this clause—

- (a) a person serving under the Government of India shall not include any person who has been declared by the Central Government to be a person to whom the provisions of this clause shall not apply;
- (b) a person serving under the Government of any State shall include a patwari, chaukidar, dafedar, zaildar, shanbagh, karnam, talati, talari, patil, village munsif, village headman or any other village officer, by whatever name he is called, employed in that State, whether the office he holds is a wholetime office or not, but shall not include any person (other than any such village officer as aforesaid) who has been declared by the State Government to be a person to whom the provisions of this clause shall not apply."

In order to determine whether a President is a village headman or a village officer reference to certain provisions of the Bengal Chaukidari Act, 1870 and the Rules contained in the Chaukidari Manual is necessary. Under Rule 129 a President is appointed from among the members of the Panchayat. A member of the Panchayat is appointed under section 3 of the Act and his appointment is made in form A under Rule 6. The appointment is made by the District Magistrate or the Sub-divisional Officer who are also the authorities concerned to appoint village headman under Section 45 Criminal Procedure Code and the statutory form of appointment (Form A) shows that in every case the District Magistrate or the Sub-divisional Magistrate appoints a member of the Panchayat to be village headman of the villages in the Union for the purposes of Section 45 Cr. P.C. The second paragraph of the form of appointment reads "For the purpose of Section 45 of the Code of Criminal Procedure you are also appointed as the village headman in all the villages comprising the above union". This settles the matter. It is clear therefore that a President who is necessarily a member of the Panchayat is a village headman. But Sri Ashok Das for the Respondent No. 1 draws our attention to the standard form of Sanad issued to the President on his appointment which is set out in Rule 129. This form does not mention that he is appointed a headman for the purpose of Section 45 Cr. P.C. The Sanad also says "You are appointed as a member and the President of the union circle number". Sri Das therefore argues that a President is not separately appointed a member of the Panchayat first and then a President, but his appointment to the membership as well as to the Presidentship is simultaneous and consequently the second part of the form A under which alone a member of the Panchayat is appointed as a village headman under Section 45 Cr. P.C. never comes into operation so far as the President is concerned. This assumes that an appointment in form A is never issued to the President in respect of his appointment as a member of the Panchayat. In the absence of evidence we cannot make the assumption. In fact it is very unlikely that an appointment in form A should not be issued in each case. It would be highly anomalous if the leading member of the Panchayat is also not appointed as a headman when similar powers are conferred upon the ordinary members.

It is unnecessary, however, to discuss the matter further as we are of opinion that in any case the powers and functions of Presidents of Chaukidari Unions make them village officers. In the first place the Sanad itself confers on them "Powers of a Magistrate under the provisions of Section 64, 127 and 128 of the Code of Criminal Procedure". Secondly, the duties of Panchayats generally as enumerated in Section V (Rules 44 to 140) leave no doubt that they perform the functions appertaining to an office and are holders of an office. It is unnecessary to set out the rules. A mere glance at them makes it clear that their functions are a combination of the functions of the Police, of the Magistracy and Collector of Taxes. They are expressly conferred some Magisterial power and they exercise the power of the police in the matter of arrest etc. Under Rules 132 and 133 they may be conferred with powers of arresting persons committing offences in their presence or ordering an unlawful assembly to disperse and of compelling them to disperse by the use of civil force. Their power of arrest is already mentioned. In para. C of Section V of the Manual their powers with regard to

collection of taxes are set out. These are only a few instances of their functions as a member of the Panchayat. All these are functions of the sovereign and the performance of such functions clearly constitute an office. There can be no doubt, therefore, that they are village officers within the Explanation.

It is, however, contended that it is not enough that a person should fall in the category enumerated in the Explanation but that in order to come under clause 8 he should also be a person serving under the State and a Union President is not such a person. The arguments run thus:—An Explanation merely supplies the meaning of the provision preceding it. It cannot enlarge the content or the scope of the provision. If a person is obviously not a government servant he cannot be so by reason of an Explanation explaining what a Government servant is. In other words the construction to be upon clause (8) is that it lays down as an essential condition that the person rendering assistance must be a person serving under the government and the Explanation merely enumerates some persons who satisfy this test. That is to say, according to Sri Ashok Das the Explanation is merely an illustration and does not bring into the scope of Clause 8 persons other than those serving under the Government. It merely gives instances of such persons.

It is true that ordinarily the function of an Explanation is to explain terms or phrases already employed and to supply the meaning of those terms. Normally an Explanation clarifies the meaning of the section and does not expand its scope. But that does not mean that the legislature can never extend the scope of a Section by an explanation. Obvious instances can easily be found; for instance, the masculine gender referring to a person in a statute can by an explanation be made to include the feminine gender. Or again an Act using the word 'Court' may by an Explanation include within the term 'Court' authorities which are obviously not Courts. There is nothing absurd in extending the scope of a Section by way of an Explanation and this is what is done in the present instance. The Explanation 'includes' within the phrase "A person serving under the Government", other persons who, but for the Explanation, would not be Government servants. In fact there does not appear to be any reason for enacting the Explanation for the purpose of indicating who are Government servants. If it is merely enumeration of clauses of Government servants it is undoubtedly very inadequate. There was no necessity for this Explanation if only those village officers specified or unspecified who are government servants are intended to be governed by it, for, they already come within the expression "Persons serving under the Government", in Clause (8). We are of opinion that the sole object of the Explanation was to bring in within the prohibition of clause (8) persons other than Government servants. By a fiction the Explanation brings in other persons within the category of Government servants.

Three decisions of Election Tribunals have been placed before us by Sri Ashok Das for Respondent No. 1. The first decision is of the Election Tribunal, Bihar published in the *Gazette of India Extraordinary* (No. 221) dated the 27th August, 1953. The Tribunal held that a 'Mukhia' of a village is not a person serving under the Government. The only reason for the decision is that a 'Mukhia' draws no pay and is not a government servant. At page 2829 of the *Gazette* the Tribunal observes "The real test of a person serving under the Government is that his salary is paid by the Government. A 'Mukhia' draws no pay and is not a Government servant. Under Section 79 of the Bihar Panchayat Raj Act, 1947 a Government servant has been specifically debarred from holding the post of a 'Mukhia' or Sarpanch. When a 'Mukhia' can be a member of the Legislative Assembly, there is absolutely no reason why he should not be able to work as polling agent of a candidate, if he so likes". The test suggested is in our opinion, not correct. It clearly overlooks the fiction introduced by the Explanation. The next two cases are decisions of the Allahabad Tribunal published in the *Gazette of India Extraordinary* dated 29th May 1953 (No. 134) and dated 30th May 1953 (No. 136). The former is a case of a Mukhia and the conclusion is that Mukhias are not Government servants. As stated above this is not the correct test. The latter case is a case of an Honorary Magistrate. In that case it was held that the Honorary Magistrate did not canvass for the candidate. It is of no assistance in the present case.

Our conclusion on this question is that Presidents of Chaukidari Union are village officers and are by reason of the Explanation to Section 123(8) persons serving under the Government of the State of Orissa.

It is, therefore, necessary to examine the evidence regarding the alleged assistance rendered to Respondent No. 1 by the Presidents mentioned in the petition. According to the petitioner Jenamani Tripathi, Narsingh Charan Pati,

Achutananda Bal and Brajakishore Mahanti who were Presidents of Unions, canvassed for respondent No. 1 along with their respective Daffadars and Choudhars. Admittedly these persons were Presidents of their respective Unions. We shall take their cases one by one.

Jenamoni Tripathi.—P.Ws. 30, 32, 53, 54 and 60 said that Jenamoni Tripathi who is President of Union No. X canvassed for respondent No. 1 R.Ws. 17, 24 and 25 said that Jenamoni Tripathi did not canvass for respondent No. 1 R.W. 17 was a worker of respondent No. 1. He took some money from respondent No. 1 for the expenses incurred by him but he denied it. The receipt Ex. 28 granted by him (R.W. 17) believes him. We have therefore, no doubt that R.W. 17 is not a truthful witness and no reliance can be placed on him. R.W. 24 is the Sub-Inspector of Police and he is a witness who denies everything alleged by the petitioner. It was urged that no reliance can be placed on him (R.W. 24) as he could not give the name of any Presidents except Jenamoni Tripathi and also could not give the correct dates of the polling in the constituency and as he falsely said that he did not see any bullocks or bullock carts during that period. R.W. 24 falsely said that he saw respondent No. 3 canvassing for the petitioner. R.W. 16 said that the respondent No. 3 canvassed for the petitioner in Shamsundarpur only. R.W. 24 said that he never went to Shamsundarpur at any time but still said that he saw respondent No. 3 canvassing for the petitioner. R.W. 25 said that Jenamoni was absent at Calcutta for about one and half months before the day of the poll and returned, on the date preceding the date fixed for the Election in the locality. But he believes himself when he said that he took a letter to the Sub-Inspector (R.W. 24) 3 or 4 days before the polling from Jenamoni Tripathi and brought the ballot boxes from him for the booth and that Jenamoni wrote that letter on the day he went to the S.I. (R.W. 24) for those articles. So the story that Jenamoni returned a day previous to the date of the polling in the area, is not true. It is an admitted fact that when a President is absent they are to inform the S.D.O. who appoints another president to work for him in his absence. There is nothing to show that Jenamoni Tripathi was away on leave at any time and he is also not examined. R.W. 25 said that he acted for Jenamoni Tripathi in his absence but there is not a scrap of paper to prove it. He (R.W. 25) said that he did not report to the S.D.O. when he took charge from Jenamoni Tripathi or made over charge to Jenamoni Tripathi. Nothing is suggested against P.W. 30 except that he stated that he never saw Jenamoni going out of his house. This does not mean that he did not see Jenamoni at the meeting in the Sorisia locality as deposed by him. P.W. 32 has not been cross-examined regarding Jenamoni. P.Ws. 53, 54 and 60 corroborate each other and P.W. 32 about Jenamoni's activities in the Chandol meeting, in every particular. We have no doubt of Jenamoni's presence in the locality. The Respondent's witnesses have set up a false case about his absence, to meet the petitioner's evidence which we consider reliable. Hence, we hold that Jenamoni Tripathi canvassed for Respondent No. 1.

Narsingh Charan Pati.—He is President of Union No. VII. P.Ws. 21, 26, 27, 29, 46, 56, 57 and 59 said that Narsingh Pati canvassed for respondent No. 1 R.Ws. 16, 48 besides Purusottam Naik (R.W. 53) who admittedly was the worker of respondent No. 1 and respondent No. 1 (R.W. 57) said that Narsingh Pati did not canvass for respondent No. 1, P.Ws. 26, 29 and 57 were not cross-examined on behalf of Respondent No. 1 about the canvassing of Narsingh Pati and their evidence go unchallenged. We have pointed out before that Bhagaban Senapati (R.W. 16) is not a truthful witness. R.W. 48 said that his sister is married to Narsingh Pati and that he looks after the affairs of Narsingh Pati who is a little deaf. There is no reason for not examining Narsingh Pati when his brother-in-law could be called and examined. He (R.W. 48) said that he cannot say to which village Narsingh Pati went from December 1951 to 15th January 1952. R.W. 48 is one of the signatories of the petition (Ex. 21) which was filed by the villagers for canal water. We accept the evidence adduced on behalf of the petitioner that Narsingh Pati canvassed for Respondent No. 1.

Achutananda Bal.—He is the President of Union No. IX. Except the bare testimony of P.W. 37 there is no evidence on this point on behalf of the petitioner and we are not prepared to accept his uncorroborated testimony. R.W. 42 who is a brother of Achutananda Bal said that Achutananda Bal did not canvass for any one. We therefore, find that the petitioner has failed to prove that Achutananda Bal canvassed for Respondent No. 1.

Brajakishore Mahanti.—He was admittedly President of Union No. XIII, but it is said on behalf of respondent No. 1 that he was not President during the Election period. It is said that Brajakishore Mahanti filed an appeal against the order of the S.D.O. when he was not appointed as the President of the Union. The order sheet (Ex. 8) shows that the appeal filed by Brajakishore Mahanti was disposed of on 12th November 1951. We have therefore, no hesitation to find that Brajakishore Mahanti was not President of the Union at the relevant time.

It was alleged that the Dafadars and Choukidars canvassed for respondent No. 1. There is no satisfactory evidence on the point though the learned lawyers of the respondent No. 1 got in cross-examination from some of the witness that one Hari Naik and Kanei Mullik, Choukidars canvassed for respondent No. 1. Even then we are not prepared to accept that any Choukidar or Dafadar canvassed for Respondent No. 1.

This issue is substantially decided in favour of the petitioner and we hold that Respondent No. 1 has committed the corrupt practice of procuring assistance from persons serving under the Government within the meaning of Section 123(8) of the Act.

Issue Nos. 17 and 18.—It is urged on behalf of Respondent No. 1 that the Sub-Manager of the Aul Court of Wards is not a person serving under the Government and consequently it is unnecessary to decide this issue. We are of opinion that the Respondent No. 1's contention is correct. The matter is governed by the Orissa Court of Wards Act 1947. The Court of Wards is a statutory body and is not a department of the Government. Employment under the Court of Wards is not employment under the Government. Although under Section 5 the Revenue Commissioner shall be the Court of Wards and under Section 7 he may exercise all or any of the powers through the Collector of the district, the Court is a creature of the statute. Under Section 26 the Court may appoint Managers of the Wards property. No provision with regard to the appointment of a Sub-Manager has been pointed out but it is clear that Sub-Managers and other employees can be appointed either by the Manager or the Collector acting for the Court in exercise of their powers of management conferred by the Act. It is admitted by Padmacharan Mohanti himself that he was appointed by the Collector. But nothing turns on that. We are of opinion that he is merely an employee of the Court. It is further to be remembered that the Provincial Government (now the State of Orissa) has nothing to do with the management of the Estate except issuing a notification of disqualification under Section 16. The employees of the Court are, therefore, not servants under the State of Orissa.

Two decisions have been cited by Sri Akhoy Kumar Das for the petitioner and they are reported in 1939 Calcutta 720 and 1948 Calcutta 150. The latter has merely followed the former. The question for decision in these cases was whether a Manager of a Court of Wards is entitled to notice under section 80 of the Civil Procedure Code as a "Public Officer" within the meaning of Section 2 Clause 17 of the C.P.C. For two reasons it is unnecessary to discuss these decisions. In the first place whatever may be the position under the Bengal Act, we are concerned with the Orissa Act of 1947 in which there is nothing to show that a Manager of a Court of Wards is a Government servant. Secondly, a decision on the question whether a person is a public officer under Section 2(17) C.P.C. will not help to determine the question whether he is a person serving under the Government. A person who is not a person serving under the Government may be designated as public officer for the purposes of the C.P.C. or for purpose of other statutes like the Indian Penal Code etc. Consequently the decisions cited are not of much assistance.

We conclude therefore that Padmacharan Mahanti, Sub-Manager of the Aul Court of Wards is not a person serving under the Government of Orissa. In the view we take of his status it is unnecessary to decide the question of fact whether he rendered any assistance in the election of Respondent No. 1; nor is it necessary to decide issue No. 17.

Issue No. 11.—Admittedly Lokanath Das (Respondent No. 3) was one of the candidates and he withdrew his candidature on the last day of withdrawal. It is also admitted that a statement (Ex. 8) of respondent No. 3 was published in the newspaper Samaj dated 22nd November 1951. According to the petitioner and his witnesses respondent No. 1 induced respondent No. 3 to withdraw by giving out a promise to employ him (respondent No. 3) in the Grow More Food

Department. Jadunath Nanda (P.W. 28) said that by Grow More Food Department he understood the Agricultural Department. Two of respondent's witnesses (R.W. 16 and R.W. 31) said that the petitioner induced respondent No. 3 who is his relation to withdraw from the contest. It is an admitted fact that respondent No. 3 is a brother of the father-in-law of the petitioner and that there were many litigations between them for the property of the father-in-law of the petitioner. It was alleged that the respondent No. 3 forged the signature of the father-in-law of the petitioner in a will just to deprive the mother-in-law of the petitioner will inherit property in the long run. It is admitted that there was decided in favour of the mother-in-law of the petitioner and that the sons of the petitioner will inherit property in the long run. It is admitted that there were many litigations but it is alleged that the petitioner and respondent No. 3 had made up that differences at the time of Election. There is no evidence to prove that they had made it up at any time. It cannot be believed that as there were so many litigations they would have made up their differences. Upendranath Bhadra (R.W. 31) said that he was polling agent of the petitioner and that he went to call respondent No. 3 at the instance of the petitioner and that respondent No. 3 came to the house of the petitioner who dictated to respondent No. 3 what was to be written and after that writing the petitioner and respondent No. 3 left together for filing the same in Court. Admittedly Upendranath Bhadra (R.W. 31) was the polling agent of the petitioner. He (R.W. 31) is not a truthful witness, will appear from the latter part of his cross-examination. He (R.W. 31) said that respondent No. 3 wrote on a white paper but he was unable to say if that white paper was a Dcmi paper or an ordinary paper. The application for withdrawal (Ex. U) shows that the paper is not white but is a printed form on a brown paper. Moreover this form (Ex. U) shows that Lokenath Das filled up the necessary things and signed it. So there is nothing which could have been dictated to respondent No. 3 for writing the withdrawal form. Upendra (R.W. 31) admitted that the son of the petitioner deposed against him in a theft case in which he was an accused. It was urged that on account of this he (R.W. 31) deposed falsely against the petitioner. We have therefore no doubt that Upendra Bhadra (R.W. 31) deposed falsely and no reliance can be placed on him. The other witness Bhagaban Senapati (R.W. 16) said that Lokenath Das (Respondent No. 3) filed the withdrawal petition and informed him on that date that he filed it at the instance of the petitioner who is his son-in-law and as otherwise the votes would be divided. Upendra (R.W. 31) said that in a meeting held in the house of the petitioner it was decided after scrutiny that respondent No. 3 would withdraw in favour of the petitioner and that then Bhagaban Senapati (R.W. 16) was present. Bhagaban (R.W. 16) did not utter a word about the meeting. Moreover if Bhagaban (R.W. 16) was present at the meeting there was no necessity for respondent No. 3 to inform Bhagaban (R.W. 16) that he was withdrawing at the instance of the petitioner as otherwise the votes would be divided. The fact that the petitioner is son-in-law of a brother of respondent No. 3 is well known to Bhagaban (R.W. 16) and others. Hence there was no necessity to inform Bhagaban (R.W. 16) that the petitioner is the son-in-law of Respondent No. 3. He (R.W. 16) also said that two or three days after that he asked respondent No. 3 to issue a statement in the papers and that he came with the respondent No. 3 from his village to the house of respondent No. 3 at Kendrapara and there respondent No. 3 wrote out something as his statement and thereafter they came together to Kendrapara and posted that letter. It was urged that he (R.W. 16) is not an independent witness and he is interested in respondent No. 1. He (R.W. 16) also said that respondent No. 3 canvassed for the petitioner in village Shamsundarpur only where respondent No. 3 ordinarily resides. The S.I. of Police (R.W. 24) was examined to say that respondent No. 3 canvassed for the petitioner in many villages. These two contradictory statements of R.Ws. 16 and 24 show that the story of canvassing by respondent No. 3 on behalf of the petitioner is false. It can never be believed that respondent No. 3 who is in bad terms with the petitioner would canvass for the petitioner. According to R.W. 16 the statement (Ext. 8) was sent by respondent No. 3 direct to the Editor of the Samaj for publication and that the statement (Ext. 8) as published is exactly what was written by respondent No. 3. The statement (Ext. 8) shows that it is not the exact copy of the statement sent by respondent No. 3 but is a substance of it. This fact belies the story of R.W. 16. It was urged on behalf of the petitioner that had the petitioner any hand in getting respondent No. 3 write out that statement (Ext. 8) then it would not have been sent to the Editor of the Samaj which is a Congress paper but would have been sent to the Editor of the Matribhumi which is said to be an anti-Congress paper. The original statement could not be produced and it is found from the evidence of P.W. 7 who is Sub-Editor of the Samaj and also of P.W. 40 who is the Manager that the original has been destroyed under the rules. But (P.W. 7) said that he cannot

say if the statement (Ext. 8) as published is a gift of the letter or not. P.W. 40 who is the Manager of the Samaj said that the original paper has been destroyed and that Sk. Faruddin (P.W. 48) is the Agent and correspondent of the Samaj at Kendrapara. It is well known and also appears from the evidence of P.W. 40 that the Editor has got the full right to omit any publication sent to him and publish the rest. According to Faruddin (P.W. 48) Lokanath Das sent a correspondence to the Editor of the Samaj through him and that he read that correspondence in which it was written that he had withdrawn at the instance of respondent No. 1, and seeing the statement (Ext. 8) he (P.W. 48) said that the portion that respondent No. 3 was withdrawing at the instance of respondent No. 1 has been omitted. It is not unusual for any man to send any correspondence through an agent and correspondent of the paper. We therefore, do not find any reason to disbelieve P.W. 48 when he said that the respondent No. 3 sent the statement through him. In the statement (Ext. 8) it is mentioned that respondent No. 3 was withdrawing as the other candidate will do good to the peasantry. It was urged on behalf of the petitioner that according to the programme of respondent No. 1 he always gave out that he will do good to the peasantry and not a single witness for the respondent No. 1 said that at any time the petitioner said that he will do good for the peasantry. Admittedly the pamphlet "Nibedan" (Ext. 14) was published by respondent No. 1. At pages 5 and 6 in paragraphs 5 and 7 of the Pamphlet (Ext. 14) respondent No. 1 described what he has done for the peasantry. We have therefore, no doubt that the person mentioned in the statement (Ext. 8) as the person who will do good to the Peasantry, refers to the respondent No. 1. Baishnab Charan Jena (P.W. 21) Mohan Charan Das (P.W. 24) and Jadunath Nanda (P.W. 28) said that respondent No. 1 along with Baishnab (P.W. 21) went to the house of respondent No. 3 in the village and requested him to withdraw from the contest and gave out a hope that he will provide him in the Grow More Food Department i.e., Agricultural Department. The evidence as adduced by the petitioner shows that the respondent No. 1 gave a blank form to respondent No. 3 for filling it up and filing it before the Returning Officer. The fact that the withdrawal application (Ex. U) is in a printed form supports the story as given by the P.Ws. 21, 24 and 28 and belies the story of R.Ws. 16 and 31. We have, therefore, no doubt that respondent No. 3 withdrew from the contest on the request of respondent No. 1.

Sri Ashok Das argues that this will not amount to bribery. It is true that it will not, unless we accept the petitioner's evidence that the inducement was accompanied by the promise or offer of some gratification. But in the light of the evidence discussed above there is no reason why we should accept a part of the evidence of the petitioner's witnesses and reject the rest. The matter would have been different if the Respondent's case was one of innocent inducement without any promise of gratification. But an entirely different version has been bolstered up with a story that we have been unable to accept. In these circumstances we prefer to accept the other version with regard to which we find the petitioner's witnesses corroborate each other in all particulars. We, therefore, answer this issue in the petitioner's favour.

Issues 19 and 20.—At the hearing Sri Akhoy Kumar Das did not press the point that Choudhury Balabhadra Prasad Das is a Government servant. Hence it is unnecessary to decide these issues.

Issue No. 21.—This issue relates to the corrupt practice under clause (8) of Section 123. Part of it has been separated in the shape of issues 22 and 23 with which we have already dealt. There remains the cases of two other Government servants, namely Gourishyam Das and Gopinath Misra.

Gourishyam Das is admittedly a Government servant as he was a Tahasildar in the Canal Revenue Department at the time of election. The petitioner in his petition described Gourishyam Das (R.W. 19) as Gourishyam Mahanti. The respondent No. 1 also in his Hazira described Gourishyam Das (R.W. 19) as Gourishyam Mahanti. Hence there is no doubt that Gourishyam Mahanti is a mistake for Gourishyam Das. Some witnesses examined on behalf of the petitioner said that he (R.W. 19) canvassed for respondent No. 1. But Gourishyam (R.W. 19) and some of the witnesses on behalf of the respondent No. 1 said that Gourishyam (R.W. 19) did not canvass for respondent No. 1. The evidence as adduced by the petitioner does not prove conclusively that Gourishyam Das (R.W. 19) canvassed for respondent No. 1. Hence we find that Gourishyam Das (R.W. 19) did not canvass for respondent No. 1.

It was urged that Gopinath Mishra (R.W. 20) who is admittedly a Government servant being an Auditor in the Co-operative Department, canvassed for respondent No. 1. P.Ws. 24, 36, 38 and 39 said that Gopinath Mishra (R.W. 20)

canvassed for respondent No. 1. R.Ws. 5 and Gopinath (R.W. 20) denied it. Gopinath (R.W. 20) admitted that P.Ws. 36 and 38 are his neighbours and that he is not in a bad terms with them. It was urged that there is no reason why P.Ws. 36 and 38 would depose falsely that Gopinath (R.W. 20) canvassed unless they saw him canvassing for respondent No. 1. R.W. 5 who is a President of the Library at Mahipal where R.S. 20 resides, said that R.W. 20 did not canvass for respondent No. 1. R.W. 20 also said that he did not canvass for respondent No. 1. It was urged that R.W. 20 is not a truthful witness as he deposed falsely that he was not at Kendrapara except on the day he voted. But his own diary (Ex. 29) shows that he was at Kendrapara from 9th January 1952 to 15th January 1952 i.e., on all the days of polling. The evidence may throw a suspicion but suspicion is no proof. We find that the petitioner has failed to prove that Gopinath Mishra (R.W. 20) canvassed for respondent No. 1.

Issue No. 24.—The petitioner's allegation is that motor vehicles and bullock carts were used on behalf of respondent No. 1 to carry voters to the booths. The motor vehicles are mentioned in the list of particulars as bearing registration number M.S.P. 614 (jeep) ORC 1200 and OEC 1545 (motor bus). Another jeep is mentioned as belonging to Satrugghana Sahu. The two vehicles bearing numbers MSP 614 and ORC 1200 belong to respondent No. 1 and they were admittedly used by him or his workers. But there is no satisfactory evidence that they carried voters during the polling. With regard to Satrugghana Sahu's jeep there is some controversy as to how long it was in the use of respondent No. 1, but there is no clear evidence that it was in his use during the polling. With regard to the bus (ORC 1545) and bullock carts there is great deal of evidence which has to be discussed in greater detail.

It is alleged that Digambar Pati was carrying voters, on behalf of respondent No. 1 in bus No. ORC 1545. It is an admitted fact that Digambar Pati is a driver of a bus. The respondent No. 1 adduced some evidence to show that bus No. ORC 1545 had no licence or road permit during the election period. This does not mean that no bus did ply without a licence or permit. Ext. 24 shows that Jagatpur Motor Association took petrol for the bus ORC 1545 on 3rd November 1951, 5th November 1951 and 27th January 1952. We have therefore no doubt that bus No. ORC 1545 did ply during the election period. P.Ws. 4, 11, 12, 13, 15 and 18 said that Digambar Pati was bringing voters to the booth in his bus. R.Ws. 4, 18, 23, 24, 29, 32 and 46 said that Digambar Pati did not bring any voter in any bus. P.W. 4 who is a police Officer said that Digambar Pati brought some voters in a bus to the Nikirei polling booth. There is no reason to disbelieve this police officer. (P.W. 4). The statements made by the witnesses examined on behalf of the respondent No. 1 are of a general nature. Ex. 24 proves conclusively that petrol was taken for bus No. ORC 1545 and the evidence of P.W. 4 proves that Digambar Pati brought some voters in his bus to Nikirei booth. Sri Ashok Das pointed out that P.W. 4 says that on enquiry he was told that Digambar Pati brought his family members in the bus. This does not prove that what was represented to him was a fact. The fact that his evidence does prove is that a worker of the petitioner complained that voters were being brought in a bus driven by Digambar Pati. This fact is strongly corroborative of the evidence of the witnesses for the petitioner that voters were carried in the bus. We believe the evidence adduced by the petitioner that the bus ORC 1545 was used on behalf of respondent No. 1 for carrying voters to the polling booth.

Regarding carrying of voters in bullock carts evidence has been led in respect of five booth—Bharatpur, Dohali, Balia, Kendrapara and Nikirei. The matter has been pressed only in respect of the first three booths. We shall take up the evidence in respect of each separately.

Bharatpur.—P.Ws. 56, 57 and 59 and R.Ws. 7, 14, 16, 19, 24, 44 and 48 spoke about Bharatpur booth. P.W. 56 said in his cross examination that Uchhab Naik drove the cart of Bhagaban Senapati (R.W. 16) but this fact is not denied by R.W. 16. He (P.W. 56) also said that Jogendra Barik drove his own cart and he does not remember the name of the third cartman in whose cart the voters came to the booth. P.W. 57 said that Khetrabasi Sahu (R.W. 17) who is a worker of respondent No. 1 arranged the carts for taking the voters to the booth. It has been pointed out before that Khetrabasi (R.W. 17) is not a truthful witness and he said that he did not work for respondent No. 1, though he had to admit the receipt (Ex. 28). P.Ws. 56 and 59 who are inhabitants of Dutial said that voters were carried to the booth by bullock carts supplied by respondent No. 1. The witnesses examined on behalf of the respondent No. 1 said that no voters

were carried to the booth on bullock carts. We accept the evidence of P.Ws. 56, 57 and 59 and find that voters were taken to Bharatpur booth in bullock carts on behalf of respondent No. 1.

Dohali.—It was said by P.Ws. 32, 53, 54 and 60 that some voters were taken to Dohali booth in bullock carts supplied by respondent No. 1 R.Ws. 6, 24, 26, 31 and 49 said that no voters came to the booth on bullock carts. The evidence of P.Ws. 53, 54 and 60 is vague and we are not prepared to act upon the evidence of P.W. 32 alone. We find that the petitioner has failed to prove that any voter went to Dohali booth on bullock carts.

Balia.—It was said by P.Ws. 32, 53, 49 and 52 that voters were taken to Balia booth on bullock carts at the instance of respondent No. 1. R.Ws. 8, 10, 24 and 45 said that no voters were taken by bullock carts to Balia booth. P.W. 49 said that respondent went to the village for canvassing and for taking the female voters paid Rs. 15 for cart hire. P.W. 52 also said so. Both of them (P.Ws. 49, and 52) said that this was in the Bhagabatghar of Bhanaga. R.W. 10 said that respondent No. 1 went to the village and they met him at the Bhagabatghar of Bhanaga. R.W. 10 admitted in his cross examination that his brother's wife and mother who are voters went in a bullock cart to the Balia booth. He (R.W. 10) also said that two bullock carts from his village i.e., Ganespur, carried the voters to the booth and three or four bullock carts carried the female voters from Bhanaga to the booth. He (R.W. 10) said that Bhanaga and Ganespur and adjacent villages. He did not say that the female members of his house went in his own cart and he also gave the names of the persons who have bullock carts and some of those names agree with those given by P.Ws. 49 and 52. R.W. 45 admitted in his examination-in-chief that four bullock carts came to the Balia booth with some female voters and on his enquiry he was told that those voters were brought as they cannot walk such a long distance. The evidence of P.Ws. 49 and 52 also show that respondent No. 1 paid Rs. 15 as cart hire as the females cannot walk such a long distance. R.W. 45 also said that he with respondent No. 1 went to the Bhagabatghar of Bhanaga and there spoke to the villagers. He (R.W. 45) also said in his cross examination that the four bullock carts brought the female voters from Bhanaga. This fact proves that the voters were brought in bullock carts to the Balia booth. We do not find any reason to disbelieve P.Ws. 49 and 52 and find that some female voters were brought to the Balia booth in bullock carts for which respondent No. 1 paid. It was urged by the learned advocate of respondent No. 1 that P.Ws. 49 and 52 said that the amount of Rs. 15 paid by respondent No. 1 was not taken by them as cart hire but it was deposited by them for the village Bhagabatghar. They also said that no account was kept for the Bhagabatghar. R.W. 10 said that no account is kept for the Bhagabatghar. It is immaterial whether the money was spent for the Bhagabatghar. We hold that it is proved that some voters went to the Balia booth in bullock carts hired by respondent No. 1.

Issue No. 31.—This issue is based upon the allegation that respondent No. 1 either promised or made contributions to schools and other institutions in order to secure votes. Five institutions are mentioned in the petition, and some others were attempted to be brought out the evidence. Those mentioned in the petition are—Dohali H. E. School, proposed H. E. School at Derabisi, Adhanga L. P. School, Adhanga Malkeswarpur M. E. School and Mahipal library. The case regarding Dehali school has not been pressed. We do not propose to discuss the evidence adduced by the petitioner on this point for two reasons. In the first place, although the witnesses say that such contributions or promises were made, the evidence is neither adequate nor specific as to any representation made by or on behalf of respondent No. 1 that the contributions would be made if people vote for him. It is difficult to say that a man who gives money to some institutions is guilty of bribery simply because an election is impending. Secondly, the respondent No. 1 has examined witnesses connected with these institutions who deny the allegations. We, therefore, hold that this allegation has not been proved, and decide this issue against the petitioner.

Issue No. 30.—It was urged that respondent No. 1 got some grants from the District Board, Cuttack and Local Board at Kendrapara for some schools in the constituency. Exts. 3, 3a, 3b and 4 show that some grants were given by the Local Board or the District Board during the election period. The evidence is insufficient to establish that respondent No. 1 procured those grants for the schools. It is quite possible that the grants were given to the schools in due course. We, therefore, find that the petitioner has failed to prove that the respondent No. 1 procured some grants for the schools.

Issues 28 and 29.—The allegation of the petitioner is that respondent No. 1 attempted to secure votes by falsely promising villagers that he will obtain for them facilities of irrigation by canals. Assuming that he made such declaration during his election propaganda it is not made clear, either in the petition or in the course of arguments, in what way such declaration was false or amounted to corrupt practice within any of the clauses in Section 123 of the Act. The implication is that it amounts to undue influence under section 123(2). But a declaration of public policy or a promise of public action is not a corrupt practice. Proviso (b) to section 123(2) clearly lays down that it shall not be deemed to be interference with an electoral right. There can be no doubt that it is not only permissible but perhaps desirable that persons seeking election shall have the liberty of declaring to the electorate what course of public action they propose to take for the good of the people. It would be dangerous to impose restriction on this freedom by extending the law regarding undue influence. In our view what has been alleged against respondent No. 1 does not amount to corrupt practice. It is unnecessary, therefore, to discuss the evidence except with regard to one matter, in respect of which it is said, that respondent No. 1 made a false promise with knowledge of its falsity. It is said that the villagers of Dutial had dug a canal on Gochar land and the authorities wanted in exchange some of their land. The villagers petitioned for the P.W.D. to take over the canal but the Collector did not give his sanction. It is alleged that respondent No. 1 told the villagers that he had, as their spokesman, got the sanction from the Collector and they would get the order in due course. It is said that no such order was in fact passed. These allegations are sought to be supported by the recitals in the petitions (Exts. 21, 21a and 21b). We do not think that these facts are established by the evidence, merely because some people have made these statements in some petitions. The respondent No. 1 may have had an assurance from the Collector. What the authorities told him is not known. The order may have been passed but not executed. One cannot infer from these circumstances that respondent No. 1 made a false representation.

For reasons given above we decide these issues in favour of the respondent No. 1.

Issues 25, 26 and 27.—This is a charge under section 123(5) of the Act. The allegation is that by publication of the pamphlet 'Mangaraj Babu O Congress' (Ex. 9) respondent No. 1 made false statements knowing them to be false, or at any rate not believing them to be true, concerning the personal character and conduct of the petitioner or in relation to his candidature. A good deal of oral evidence has been led regarding the propaganda with reference to this pamphlet and its effect upon the prospects of the petitioner. It is needless to go into this evidence. The decision of the question will turn on the examination of the pamphlet itself upon which the charge is based. Upon the question whether the onus is on the petitioner of proving the falsity of the statements or on the respondent No. 1 of proving reasonable grounds of belief in those statements a good deal of argument has been advanced. The law of libel has been suggested as the test for establishing the charge. These considerations do not arise in construing Sub-section (5) of section 123. The provision is clear. It says that false statements regarding personal character of a candidate amount to corrupt practices. Statements touching the conduct of a candidate in relation to his public life are excluded. We are of opinion that the pamphlet is substantially directed against the public activities of the petitioner. It refers to his alleged communal activities, his connection with Khetriya Khandayet Mahasabha, and with the ex-Rulers of the States in their alleged resistance to merger with the State of Orissa, his defection from the Congress Party and such other matters of public concern. The pamphlet was issued by the Provincial Congress Committee and judging it as a whole we have no doubt that it was and was intended to be an attack on the petitioner's conduct in relation to his previous history as a public man. How far the allegations were justified is another matter. We, therefore, hold that respondent No. 1 is not guilty of any corrupt practice under sub-section (5) of section 123 of the Act and this issue is decided against the petitioner.

Issues 15 and 16.—In para. 12 of the petition it is alleged that the Return of Election Expenses filed by the petitioner is not in accordance with law. The correctness of the account, however, has not been challenged and nothing is mentioned in the list of particulars. At the hearing it was urged that the Return was not written on stamped paper as required by Rule 112 (although stamps have been attached). Certain other trivial irregularities were pointed out such as misplacing certain items in wrong columns and so on. It was argued that under Section 7(c) of the Act failure to lodge a return in the manner required

by or under the Act disqualifies respondent No. 1 from being a member of the legislature. There is no substance in this contention the short answer to which is that the election of a returned candidate can be set aside under section (2) (c) only when the non-compliance with the Act or Rules has materially affected the result of the election. It cannot possibly be suggested that the result of the election has been affected by the alleged irregularities. We decide these issues against the petitioner.

Treating.—An issue on this question of treating was not suggested by either party at the time of settlement of issues, although it properly arises upon the pleadings. Evidence, however, has been led and the point fully argued and no one has been prejudiced by omission of the issue.

According to the petitioner, respondent No. 1 opened kitchen near the Getalia, Nikirei and Kendrapara booth where voters were fed at his expense. There are a number of witnesses on both sides. It is sufficient to say that the evidence on this point is so equally balanced that it is difficult to hold that the charge of treating has been established. Accordingly we decide this issue in favour of Respondent No. 1.

Issues 12, 13, 14 and 38.—We have found above that Respondent No. 1 induced Respondent No. 3 to withdraw from the election by a promise of gratification, that he procured assistance of Extra-departmental Agents and of Presidents of Chaukidari Unions in furtherance of the prospects of his election and that he hired or procured a motor bus and some bullock carts for transport of voters. It is therefore clear that his election must be set aside.

A point, however, has to be noticed which was urged at the hearing. Respondent No. 1 in his evidence said that he instructed his workers that "they should not seek any help from any government servant or feed any voter or take any voter to the booth, in any kind of conveyance". This evidence is given obviously with a view to the provisions of clause (a) of Section 100(3) which says that if any corrupt practice is committed contrary to the orders of a candidate or his agent the Tribunal may decide that the election of the returned candidate is not void. We think that this is an after thought. The ground was not specifically taken in the written statement and no issue was framed on this point, nor was anything said in evidence under Purusottam Naik (R.W. 53) and Respondent No. 1 himself were examined. We do not believe that the corrupt practices found against the Respondent No. 1 were committed against his wish or without his knowledge.

These issues are therefore decided against Respondent No. 1.

RECRIMINATION

Issues 33 to 37.—Only two matters were pressed before us by Sri Ashok Das under these issues. It is urged that the petitioner is guilty of corrupt practice under Section 124(5) as he systematically appealed to the Khandayet voters to vote for him on the ground of caste. The other allegation is that in his pamphlet (Ex. C) he attempted to exercise undue influence upon the Respondent No. 1 by threat of divine displeasure. The second allegation can be disposed of briefly. The complaint is that in Ex. C petitioner stated that if Respondent No. 1 and Congress men had been wise they would have refrained from seeking entry into the legislature and God and Mahatma Gandhi would have forgiven them. No one can seriously regard this as an attempt to induce a belief in a person that he would be the object of divine displeasure.

With regard to communal propaganda a large number of witnesses on behalf of Respondent No. 1 have stated that the petitioner appealed to the Khandayets to vote for him on the ground of caste. Their evidence raises a good deal of suspicion, and but for a circumstance to be referred to presently, we might have been inclined to accept their evidence. In his election pamphlet (Ex. C) the petitioner has taken umbrage at the suggestion that he is communal and has vehemently refuted the charge. His anxiety to appear as a non-communal candidate makes it unlikely that he would have openly appealed to caste. His previous written speeches, which have been brought on the record, had undoubtedly a strong communal tinge. But they were long before the election. We are not prepared to say that the charge against him has been established. Accordingly we decide these issues in favour of the petitioner.

Issues 9, 10 and 32.—In view of the Notification issued by the Election Commission (Ex. 33) these issues were not pressed.

Issue No. 39.—This issue was not pressed.

Issue No. 40.—In his petition the petitioner has made a prayer that he be declared to be duly elected from the constituency. He has stated in his evidence that he polled 11,895 votes and the Respondent No. 1 polled 12,863 votes. According to him but for the corrupt practices committed by Respondent No. 1 he would have obtained the majority of valid votes and he prays accordingly that he may be declared elected. There is hardly any evidence which will induce us to hold that the margin of nine hundred and odd votes is due to the corrupt practices that the Respondent No. 1 has been found to have committed. We do not think therefore that we shall be justified upon the evidence, in declaring the petitioner as the duly elected candidate. According to our findings, however, the petitioner is entitled to the first relief claimed by him, namely a declaration that the election of Respondent No. 1 is void.

There remains the question of costs. In this case there are special circumstances for which we think that the party succeeding is entitled to a substantial cost. The hearing of the case commenced in March 1953 and dragged on for no fault of the petitioner for so many months, the hearing having been stayed for some months at the instance of Respondent No. 1. The hearing itself has been long involving considerable expenditure. We therefore assess the costs at Rs. 800 payable by Respondent No. 1 to the petitioner. The petitioner will be entitled to payment of this amount out of the deposit made by Respondent No. 1 along with his recrimination petition.

The petition is therefore allowed with costs of Rs. 800. The election of Respondent No. 1 is declared void on the ground of commission of major corrupt practices. The prayer of the petitioner that he be declared to be elected and the petition of recrimination filed by Respondent No. 1 are rejected.

The 16th November, 1953.

(Sd.) K. D. CHATTERJI, Member.

(Sd.) N. C. GANGULI, Chairman.

Sri R. C. Mitra, Member.

With due deference to my learned colleagues, I am constrained to differ from them on the question of law as to whether the Extra Departmental Agents of the Post Office and President Panchayats are persons serving under the Government within the meaning of Rule 123(8)(b) of the Representation of the People Act, 1951 and on the questions of fact as to (1) whether the Extra Departmental Agents of the Post Office named Padmacharan Thatoi and Indramoni Misra canvassed for respondent No. 1; (2) whether the Presidents Jenamoni Tripathy and Narsing Pati took part in the Election on behalf of respondent No. 1, (3) whether the respondent No. 1 did promise or offer to respondent No. 3 an employment in the Grow More Food Department for which the latter withdrew from his candidature at the Election; (4) whether the respondent No. 1 used any bullock cart for carrying voters to the booth at Bharatpur and Balia; and (5) whether the respondent No. 1 used bus No. ORC 1545 for carrying voters to the booth.

The first point that arises for consideration is whether the Extra Departmental Agents of the Post Office are persons serving under the Government. The oral evidence on the point consists of the testimony of a Postal Inspector (P.W. 1) who states that Government servants' Conduct Rules apply to Extra Departmental Agents to some extent but not to full extent and that when an E.D.A. goes on leave he gives his own substitute on his own responsibility for all the work of his substitute. He adds that he cannot say whether Padmacharan Thatoi (P.W. 46) who is admittedly an E.D.A. has furnished any security bond at the time of his appointment. The declaration of Padmacharan (P.W. 19) shows that he never promised to abide by the Government Servants' Conduct Rules but only understood the same. This indirectly means that he is not bound to be guided by the Government Servants Conduct Rules like other Government servants.

Chapter II of the Post and Telegraphs Manual, Vol. II at page 37, Rule 103 runs as follows:—

“Where owing to the negligence of a departmental employee or its agent including an extra-departmental agent, or through the omission on his part to observe any rule as provided in the different volumes of the Post and Telegraphs Manual or in the post and Telegraphs guide, the Department either by reason of the enquiry being impeded

or frustrated, directly or indirectly or for any other reason, is put to a loss of Government money or property,.....may be required to make good the loss either in whole or in part as the competent authority may decide".

It is pretty clear from the above that the postal authorities drew a distinction between an employee and an extra-departmental agent. The Postal rules show that extra-departmental agents are appointed from among "School masters, station masters, shop-keepers, land holders and pensioned servants of Government who have sources of income a part from their allowance for postal work (Vide paragraph 284 of Post and Telegraphs Manual, Vol. IV). Besides, Rule 90 of the Manual Vol. II at page 35 lays down that no postal employee can bid at any auction sale of Government property. Can it be said that a pensioned servant of Government who is appointed as Extra-Departmental Agent of the Post Office cannot be allowed to bid, either directly or indirectly, at a sale by auction of Government property? I think they may bid if they choose as against the provisions contained in the rule quoted above.

Reference may be made to the observation of Bramwell J. in *R. Vrs. Walker* (1858) 27 L.J. Com. Law page 207 to the effect that "A principal has the right to direct what the agent has to do, a master has not only that right but also the right to show how it is to be done". There is a very fine distinction between an agent and a servant and this is clearly understood when the conditions of work or relationships between the two parties are brought before the mind's eye. The E.D.A. goes out on leave even without taking the permission of his departmental superior and engaging his own substitute for whose actions he is wholly responsible. It is a fact that no servant is responsible for his substitute before his master. It is, however, urged that the E.D.A. has to work according to the directions of his superior as to the manner in which he will work within a specified time. Even a contractor has to work in the manner or time in which the principal directs him to do. Rule 420 of the Post and Telegraphs Manual Vol. II at page 163 relating to the chapter of contract lays down that "the employment of a contractor does not relieve the officer in charge of a work from responsibility as to the manner or time in which the work is done". A contractor is asked to build a house in a particular manner and within a particular time. He cannot possibly over-ride the directions of his principal on these points. It is laid down that extra-departmental agents like Punkha pullers, sweepers, grass cutters, cobblers etc. are wholly excluded from the operation of Civil Services Rules, Vide Para. 4 of the Manual of Appointments and Allowances of Officers of the Indian Post and Telegraphs Department, Chapter I regarding classification and status of services. The nature of contract between the two parties decides the question whether the contracting parties are principal and agent or master and servant. Extra-Departmental Agents have no claim whatever to any permanent job, and they are not entitled to get promotions like the ordinary Government servants. The rules relating to leave, gratuity pay and pension do not apply to them. They, like an ordinary day labourer enjoy no privileges or amenities. They are not even entitled to casual leave. The extra-departmental agent enjoys the freedom to leave his service whenever he chooses and to absent himself leaving a substitute. He may keep the cash and valuables of the Postal Department at his own risk in his house. Of course, he is to come at a fixed time to the place of work and to do certain duties according to the directions of the Postal authorities like a day labourer. He is controlled to certain extent in the hours of business like a day labourer. My learned colleagues while holding that E. D. As. are persons serving under the Government of India in the Postal Department have been constrained to admit that they are a different class from other postal servants. My finding is that if Extra Departmental Agents are a separate class of Government employees, there would have been no necessity of making special mention of "E.D.A." in addition to the employees in rule 103 at page 37 of the Post and Telegraphs Manual, Vol. II. In view of my above finding and agreeing with the view of the majority of members in the Election Petition No. 14 of 1952 of Himachal Pradesh reported in the *Gazette of India* No. 161 dated 19th June 1953, I find that Extra-Departmental Agents are not Government servants.

Having come to the above conclusion it is unnecessary for me to decide as to whether the Extra Departmental Agents named Padmasharan Thatoi (R.W. 46) and Indramoni Misra (R.W. 6) canvassed for the respondent No. 1. But assuming for arguments that they are Government servants it should be considered if the evidence of the petitioner's witnesses as to whether the Respondent No. 1 received assistance from them for the furtherance of the prospects of his election, can at all be admissible in view of the following provision of law. Section 83(2) of the Representation of the People Act imperatively lays down that the

election petition "shall set forth full particulars of any corrupt practices including as full a statement as possible as to the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice". The petition is lacking in all these particulars. It is simply mentioned that Indramoni Misra, Branch Post Master of Danpur Post Office and Padmacharan Thatoi, Branch Post Master of Tilotamadeipur popularly known as Barimul Post Office who acted as polling agent of Respondent No. 1 at Nikrai Polling centre *were engaged in active election work on behalf of respondent No. 1*. The time and the places where the alleged corrupt practices were committed have not been mentioned in the election petition and hence the whole evidence of the petitioner on this score is liable to be rejected as an after-thought. The majority view in Election Petition No. 14 of 1952 of Himachal Pradesh, Simla referred to above supports my finding in this respect.

Besides, the petitioner has examined eleven witnesses, namely, P.Ws. 30, 31, 32, 37, 41, 46, 53, 54 and 60 to prove the corrupt practices of Indramoni Misra and P.Ws. 11 to 14, 16 and 17 to prove the corrupt practices of Padmacharan Thatoi (R.W. 46). P.Ws. 11 to 14, 16, 17, 22, 25, 37 and 41 were summoned on 26th February 1953. A petition was filed by the petitioner on 5th March 1953 for amendment of his election petition. If the petitioner had collected informations above the alleged corrupt practices from the aforesaid witnesses before the amendment petition was filed in Court on 5th March 1953, he should have given full particulars therein about the time and places. Besides, there was no bar to his making an application for amendment even on a later date when he got positive informations from his other witnesses mentioned above. On this ground alone, I think, no weight should be attached to their testimony.

The next point for consideration is whether President Panchayets are persons serving under the Government of the State. Rule 123(8), sub-clause (b) of the R.P. Act lays down an explanation that "For the purposes of this clause a person serving under the Government of any State shall include a Patwari *Chaukidar*, *Daffadar*, *Zaildar*, *Shanbhag*, *Karnam*, *Talati*, *Talari*, *Patil*, village *Munsif*, village headman, or any other village officer, by whatever name he is called, employed in that State, whether the office he holds is a whole-time office or not.....". The words '*Chaukidar* and *Daffadar*' appear to have been taken from the village *Chaukidari* Act, 1870 (Bengal Act VI of 1870) and from *Chaukidari* Manual. The President Panchayet is named in the *Chaukidari* Manual. If the legislature wanted to include the President Panchayets in the above list, this would have been done by specifically mentioning his name. The omission of the name supports the Respondent No. 1's contention that the President Panchayet is not a Government servant. Under Section 3 of the village *Chaukidari* Act the District Magistrate may by an order in writing, appoint not less than three, nor more than five residents in any village within the district of which he has charge to be the Panchayet thereof. Rule 129 of the *Chaukidari* Manual lays down that the leading member of the Panchayet shall be selected by the District Magistrate and shall be designated the President, his appointment as such being specified in his Sanad. Section 8 of the Act prescribes penalties on refusing to act as a member of the Panchayet. It is laid down in that section if a person refused to undertake the office of a Panchayet he shall be liable to a fine which may extend to fifty rupees. It appears therefore, that the leading member of the Panchayet *viz.* the President, his appointment as such being specified in his Sanad. Section 8 of the consent. The President Panchayet is not paid any salary for his services. It has been pointed out by the learned Advocate for the petitioner that Form A of the *Chaukidari* Manual printed at page 66 shows that for the purposes of Section 45 of the Code of Criminal Procedure, the Panchayet is also appointed to be a headman in all the villages comprising the above Union, and it is argued that he must be considered a Government servant when he holds the office of the headman within the meaning of Sub-Clause (b), Section 123(8) of R.P. Act. Sub-Clause 3 of Section 45 Cr.P.C. provides that the District Magistrate or Sub-divisional Magistrate may from time to time appoint one or more persons *with his or their consent*, to perform the duties of a village headman under this Section. So to appoint the President as a village headman the Magistrate has to obtain his consent. The Bengal Rules provide that when a principal or collecting member of a *Chaukidari* Panchayet is appointed as village headman a clause shall be added to the appointment under Section 3 of the *Chaukidari* Act to the effect that he has also been appointed to be village headman under Section 45 of the Criminal Procedure Code. Form A at page 66, therefore, makes mention that for the purposes of Section 45 of Cr. P.C. the Panchayet is appointed to be a headman and this portion is to be cancelled if he is not appointed as the village headman. In the Sanad to the President the standard form as given at page 25 of the

Chaukidari Manual does not mention that the President is also appointed to be a headman. There being no proof in this case that the consent of the Presidents, Jenamoni Tripathy and Narsing Pati was ever taken by the Magistrate for being appointed as headman in all the villages comprised in their respective Unions, I find that they are not village headmen under the provisions of Section 45 Cr. P.C. and cannot, therefore, be treated as village headmen within the meaning of Rule 123(8) sub clause (b). Next, it has been contended that the President is a village Officer and as such is a person serving under the Government of the State of Orissa. Indeed, there are "village officers" in the Ganjam District of Orissa who are designated as Karji, Karanm, Taliari and the like and who are appointed as such under the relevant Madras Acts e.g. The Madras Hereditary village Officers Act, 1895, but in the district of Cuttack there is no such law to appoint "village officers" and the President cannot be designated as a "village officer". In the Election Petition No. 124 of 1952, decided by the Election Tribunal, Patna, it was held that 'Mukhia' is not a village headman and not a person serving under the Government (*Vide the Gazette of India No. 221 at page 2829*). There it was observed by the learned members of the Election Tribunal, that "the real test of a person serving under the Government is that his salary is paid by the Government". A President Panchayet draws no pay from the Government and is not a Government servant. In the case of Abduul Rauf Vrs. Makhtar Ali (*Gazette of India Extraordinary*, dated the 5th January, 1953) the Election Tribunal was considering whether a Gaonburah of Assam is really a village headman employed by the Government of Assam for performing some public duties. The Tribunal found that he is a village headman and that he is a person serving under the Government for which he receives consideration in shape of revenue remission for some land held by him. As the President Panchayet receives no pay, or emoluments from the Government and has to perform certain duties under compulsion by virtue of his appointment by the District Magistrate under the provision of the Chaukidari Act he cannot be considered as a person serving under the Government. To be a servant of the Government, the former must give his consent and may be paid certain emoluments for the services rendered. I, therefore, find that the President Panchayets, Jenamoni Tripathy and Narsing Pati are not persons serving under the Government. The petitioner has produced a good deal of evidence to show that the said Presidents canvassed for the Respondent No. 1. Such canvassing is not prohibited by Section 123(8) of the R.P. Act, as I have held that they are not Government servants.

I may also mention in this connection that the petitioner has not complied with the provisions of Section 83(2) of the R.P. Act, not having given as full a statement as possible as to the dates and places of the commission of the alleged corrupt practices by the aforesaid President Panchayets. P.W. Nos. 30, 32, 53, 54 and 60 have come to depose regarding the alleged canvassing by Jenamoni Tripathy P.W. 30 was summoned on 9th March, 1953, P.W. 32 and 19th March, 1953, P.W. 54 and 60 on 5th August, 1953. It is not explained on behalf of the petitioner why no petition was filed to amend the election petition. I decide this point against the petitioner.

I shall now deal with the next point. The case for the petitioner is that the respondent No. 1 promised to give an employment to the respondent No. 3 in the Grow More Food Department for which the latter withdrew from his candidature at the election. I agree with my learned colleagues on their finding that at the instance of the respondent No. 1, the respondent No. 3 withdrew from his candidature. It is, however, to be seen whether the respondent No. 3 withdrew from the candidature when the respondent No. 1 promised to give him an employment in the Grow More Food Department. It has not been proved on behalf of the petitioner that the Grow More Food Department was in existence at the time of the election. The respondent No. 1 was not then a Minister of the Government, and he had practically no power to appoint anybody in the said Department. It was not, therefore, possible for him to make such a promise. Besides, it is seen that although the respondent No. 3 withdrew his candidature at the instance of respondent No. 1, the former got no appointment in the Grow More Food Department or in any other department of the Government, even up to now after the respondent No. 1 was appointed as a Minister. It has transpired from the evidence of P.W. 21 that Loknath Babu has vast properties, has got a rice hauler, and has got other machineries for improvement of his agricultural lands. P.W. 28 deposes that Loknath Babu is aged about 50 years. His house is at a distance of about 20 cubits from the mill of Loknath Babu and his evidence as to the age of Loknath Babu may be accepted. P.W. 24 states that Loknath Das is the richest man in their village and he is a plucked matric. It is not understood what sort of job could have been given to such a rich man with such poor educational qualification which would be acceptable to him. Besides, it is not likely that an old man of about 50

years having vast properties and rice mill and machinaries for improvement of agriculture would care to accept any job in the Grow More Food Department of the Government. I do not and cannot believe that respondent No. 1 promised to provide respondent No. 3 with a job in the Grow More Food Department, for which the latter agreed to withdraw his candidature in the last election.

Next it has been alleged in the list of particulars of corrupt and illegal practices committed by respondent No. 1 and with his connivance, that numerous bullock carts were used by respondent No. 1 and by his workers and supporters to the knowledge, consent and approval of the respondent No. 1 and at his instance for the purpose of carrying voters to the polling booths, Bharatpur and Balia. With regard to the other booths my learned colleagues have found against the petitioner. I agree with them. With regard to Bharatpur booth P.W. 56 would make us believe that respondent No. 1 carried voters to the Bharatpur booth in bullock carts and jeeps. I can hardly accept such a statement that the respondent No. 1 who was then an Advocate of the Hon'ble High Court would himself under take such a work. P.W. 57 states that the voters were carried from their village to Bharatpur booth in bullock carts arranged by Khetrabasi Sahu who is a worker of respondent No. 1. In his cross-examination he admits that Brundaban and Khetrabasi informed him that the cart was hired by the respondent No. 1. Brundaban Behera has not been examined. Khetrabasi (R.W. 17) states that no voter on behalf of Respondent No. 1 was brought to Bharatpur booth by cart R.W. 17 was not cross-examined as to whether he gave the intimation to Gourangcharan Swain, P.W. 57 that the voters were carried in cart on behalf of respondent No. 1. The evidence of P.W. 57 being hearsay evidence carries no weight. He is a Khandayat and the petitioner was the President of the Khandayat-Kshetriya Mahasabha. The petitioner has been all along fighting for the uplift of the Khandayets, was agitating tooth and nail for providing the Khandayats with Government posts and for giving them all sorts of amenities from the Government on the ground that the Khandayets formed 60 per cent. of the Orissa population and was spreading the idea among the Khandayets in several meetings and conferences about the degraded position of the Khandayets as against the Oriya Karans and Brahmins etc. who are widely enjoying the loaves and fishes under the Government of Orissa, *vide* Ex. F. Besides, the testimony of P.W. 57 being hearsay it has to be treated with caution as he is a Khandayat, P.W. 59 states that the voters came to the Bharatpur booth in bullock carts engaged by Bhagan Senapati and Narsingh Satpati on behalf of respondent No. 1. It is admitted by him in cross-examination that the carts went upto the booth. It is not understood why the workers of the petitioner did not report the fact to the presiding officer or the police officer in charge of the polling station. He states that he was not present when Bhagaban Senapati and Narsingh Pati had engaged the carts. He only saw Bhagaban and Narsingh going along with the carts. It is not explained how the witness could say that the bullock carts were provided by respondent No. 1. On the other hand R.W. 16 Bhagaban Senapati denies that he arranged carts on behalf of respondent No. 1. to bring voters to the booth. He further adds that Narsingh Pati also never arranged carts to bring voters to the booth on behalf of respondent No. 1. Gourishyam Das (R.W. 19) who is a Zilladar in the Canal Revenue Department states that he did not see any voter coming in any conveyance to Bharatpur booth. It is asserted in the election petition that one Gourishyam Mohanty of Canal Revenue Department of Kendrapara Subdivision who is a Government servant was engaged in active election work on behalf of respondent No. 1. R.W. 19 Gourishyam Das states on oath that he is the Zilladar in the Canal Revenue Department and there was no Gourishyam Mohanty in 1951 or in 1952 in the Canal Revenue Department either as Tahasildar or a Zilladar. He further states that he did not canvass for respondent No. 1 or addressed a meeting at Kantia Math. In his cross-examination he deposes that he was Tahasildar in the Canal Revenue Department during the period of election. It is abundantly clear that no person by the name Gourishyam Mohanty canvassed for the respondent No. 1. On the date Gourishyam Das was examined the clerk of the Advocate wrote the Haziri mentioning Gourishyam Das as Gourishyam Mohanty. This was, indeed, a confusion of the clerk concerned for which no adverse inference can be drawn against respondent No. 1. Baishnab Charan Biswal (R. W. 44) deposes that no voter on behalf of respondent No. 1 was brought in bullock cart or Jeeps to the Bharatpur booth which is about 500 cubits from his house. He was not cross-examined on this point. The petitioner states that he reported to the Returning Officer, Sri Bibhutibhusan Tripathy (P.W. 3) thrice orally about the mal-practices of the respondent No. 1 during the period of election. He did not file a written report as P.W. 3 directed him not to do so, on the ground that he would have to forward the complaint to the District Magistrate who will sack the poor fellows. It is strange that Sri B. Tripathy who was the Subdivisional Magistrate of Kendrapara would give such an advice to the petitioner. Nothing was said or suggested why the Sub-divisional Magistrate

(P.W. 3) was not examined-in-chief on the point. I, therefore, find that the petitioner has signally failed to prove that the respondent No. 1 engaged bullock carts to bring the voters to Bharatpur booth.

With regard to the Balia booth, P.W. 49 says that the respondent No. 1 requested him and others of his village to take the females on carts. On being enquired as to who would pay the fares of the carts, respondent No. 1 said that he would pay the same. It is said that 4 bullock carts were required to carry 20 to 25 females from their village to Balia booth. The villagers asked the Respondent No. 1 to pay Rs. 20 as cart hire. But the respondent No. 1 paid only Rs. 15. The witness is a Khandayet. It is strange that after receiving a sum of Rs. 15 which was not spent for paying hire of the carts and which was credited to Bhagabatghar Tahabil account the witness would come to depose in favour of the petitioner. He is practically an accomplice and his statement is of no value. He admits in cross-examination that he met the petitioner at Chandol Hat in Jaistha last and on the enquiry made by the petitioner he told the latter about this payment of Rs. 15 by respondent No. 1. If it were a fact the petitioner would have amended the petition after getting the information from the witness. P.W. 52 states that respondent No. 1 asked the villagers to take their females in bullock cart and promised to pay the hire. The witness further stated that Karuni Bal (P.W. 49) said that the cart hire would amount to Rs. 20. But respondent No. 1 paid Rs. 15 to Karuni. The witness is also a Khandayet. His wife went along with others in his cart and the sum of Rs. 15 which was paid by respondent No. 1 as cart hire was kept to be spent for the Bhagabatghar. These villagers are said to have cast their votes in favour of Respondent No. 1. If really they were supporters of respondent No. 1, they would not likely come forward to depose on behalf of the petitioner, to unseat the respondent No. 1 from the Assembly. I have observed above that no explanation is forthcoming why P.W. 3 Sri B. Tripathy, S.D.O. was not examined on this point. R.W. 8 states that his house is at a distance of 300 cubits from the Balia booth and that the male and female voters came to the booth on foot on both days of polling. R.W. 10 who is an inhabitant of Bhananga and a co-villager of P.W. 49 and 52 states that it is not a fact that the respondent No. 1 paid Rs. 15 for carrying the female voters to the booth in carts. R.W. 24 Sri K. C. Das is the S.I. of Police and was the Officer-in-charge of Kendrapara P. S. from January 1951 to December 1952. As an Officer-in-charge it was his duty to go round to all the booths and see that proper arrangements had been made. No one complained to him that any candidate was bringing voters in conveyances and he also did not see any. He is a dis-interested Government servant and there is no reason why his testimony would be discredited. R.W. 45 accompanied the respondent No. 1 when he went to Bhananga. He states that respondent No. 1 did not pay any amount to Karuni Bal (P.W. 49) or any person to bring voters in carts to the booth. He was at Balia booth during polls. Four bullock carts came to the booth with the voters. He enquired from the voters who came in the carts and was informed that they had come in their own bullock carts as the females of their houses could not walk such a long distance of five miles. It may not be untrue that when some females came in four bullock carts the story of payment of Rs. 15 as cart hire by the respondent No. 1 was fabricated.

The petitioner has signally failed to prove that the respondent No. 1 provided bullock carts to the voters to come to the Bharatpur and Balia booths.

I agree with my learned colleagues that the respondent No. 1 did not arrange any bullock cart for carrying voters to the other polling booths.

Further, it is asserted in the list of particulars of corrupt practices committed by respondent No. 1 that he used ORC 1545 belonging to Jagatpur Motor Association for carrying voters to various polling booths. The only documentary evidence in this connection is Ext. 24 which shows that the Jagatpur Motor Association purchased 16 gallons of petrol on 3rd November 1951 for bus 1545. They also purchased 18 gallons of petrol and 10 gallons of petrol on 5th November and 10th November 1951 respectively. The name of Jagatpur Motor Association is given in column 3 which is the column for the name of the owner. The petitioner has got to establish that the respondent No. 1 engaged this bus for the purpose of his election. P.W. 4 Mahamad Yusuf who is an A.S.I. of Police states that an agent of the petitioner in Nikirai booth complained to him in course of the election that Digambar Pati was bringing voters in his bus for the respondent No. 1. The A.S.I. on enquiry came to know from the driver that no voters had come in the bus and that he brought his own family members in the bus. The witness does not remember the number of the bus. His testimony does not help the petitioner. There is nothing to connect this bus with the respondent No. 1. Admitting that Digambar brought his family members in the bus, there is nothing to complain. Besides, the identity of the Bus No. 1545 is not established as the witness

does not remember the number of the bus. No note was made of the complaint made to the Police witness who was on duty there. P.W. 11 who is a polling agent of the petitioner at Nikirai booth states that the voters of respondent No. 1 were coming to the booth in motor buses which are public buses, jeeps and bullock carts. There is nothing to connect respondent No. 1 with the said conveyances. He further states that one bus only was bringing voters and Digamber Pati was driving. Assuming the statement of the witness to be true there is nothing to connect respondent No. 1 with the bus that was being driven by Digamber Pati during the five days of polling. The witness in his examination-in-chief states that he informed about this to the Presiding Officer of the booth, the petitioner and the A.S.I. who was on duty. The Presiding Officer is not summoned, to prove the alleged complaint, P.W. 12 also states that many voters came in buses, jeep and bullock carts that in all the busses, jeeps and carts the poster of two bullocks with plough were pasted. The voters were being brought in buses and cars close to the booth, but after objections were made to the Police and Presiding Officer they were not coming near the booth, but the buses and cars were dropping the voters near a culvert which is about a quarter mile from the booth. It is strange that the Police A.S.I. (P.W. 4) does not support this testimony. Neither the Presiding Officer was summoned to corroborate this testimony. P.W. 13 states that he came to Nikirai in a bus which was being driven by Digamber Pati on behalf of the respondent No. 1 and that many other voters also came with him in that bus. He further states that the posters of 2 bullocks with plough were posted on the side of the bus. *He is a Khandayat.* He would make us believe that before voting he took tea and tiffin and after voting he took meals supplied on behalf of respondent No. 1. He was Tahasil Panchayet and it was suggested that he was dismissed for embezzling Government money. It is hard to believe that posters would be pasted on the side of the bus to indicate that the bus had been arranged by the Respondent No. 1. When the bus was running on the road, it was likely that Government servants and the men of high position would have noticed this fact and the Respondent No. 1 or his workers would not allow such publicity of their corrupt practices. The testimony of P.W. 13 who is a Khandayat and who took meals free supplied by the respondent No. 1 has come to depose to help the petitioner and this can hardly be believed. P.W. 15 states that voters came to vote in bus and cars which were engaged by respondent No. 1. There is nothing to show that bus No-ORC 1545 was engaged by Respondent No. 1. As the buses and bullock carts had the symbols of two bullocks and plough pasted on them, the witness states that he could understand that they were engaged by Respondent No. 1. I have observed above that the Respondent No. 1 cannot be such a fool as to paste his symbol on the bus for identification by persons in authority. P.W. 18 states that many voters came in bus, but he cannot say if they were paying fares. Again he states that the symbol of bullocks with a plough was pasted on the bus. He was careful to notice that the said bus plied on the road on the days of polling only and did not ply before. He simply heard that they were plying on behalf of the Respondent No. 1. He is a Khandayat by caste. It is not likely that the respondent No. 1 would paste his symbol on the side of the bus as observed above. This witness had the pleasure of taking tea and tiffin free which was supplied on behalf of respondent No. 1 and has come to depose on behalf of the petitioner. I have got to repeat here that the S.D.O. should have been examined as to whether any complaint was made to him by the petitioner on the point. On the other hand R.W. 4 states that Digambar Pati did not bring any voter in a bus. R.W. 18 who is clerk in the Regional Transport Office states that Bus No. 1545 does not belong to Jagatpur Motor Association and it was never owned by that Association. It has transpired from his evidence that Bus No. 1545 had no road permit from 1st July 1951 to 30th January 1952 either permanent or temporary. I have seen from Ext. 24 that the said bus purchased petrol in the month of November, 1951 and not in the month of January when the polling took place. It is hard to believe that the above petrol was utilised for election purposes. The petitioner states that he does not know the names of persons who were joint owners of Bus No. 1545, although it is mentioned in the list of corrupt practices that the bus belonged to Jagatpur Motor Association. He admits that the Motor Association has an organised office with a Secretary. The Secretary should have been summoned, to prove that the bus was engaged by the Respondent No. 1 during the polls if at all it was a fact. As observed above Mohini Charan Das who was the Officer-in-charge of Kendrapara P.S. (R.W. 24) states that he was visiting all the booths, during the polls. He does not say that he ever saw ORC 1545 carrying voters to the booths. He knows Digamber Pati and he could have identified if Bus No. 1545 was bringing voters to the booth by the driver Digamber Pati. R.W. 29 states that he knows Digamber Pati who is a driver in a motor bus in the service line from Jagatpur to Pattamunde, but he does not say anything about ORC 1545. The Respondent No. 1 states on oath that the Bus ORC 1545 was not used by him during election in any way. I should again observe here that the petitioner

should have examined Sri Bibhutibhusan Tripathy S.D.O. on this point as to whether he made any complaint regarding the bus No. ORC 1545 to him.

Thus, the petitioner has failed to make out that respondent No. 1 used ORC 1545 belonging to Jagatpur Motor Association for carrying his voters to various polling booths.

I agree with my learned colleagues on the other points.

In the result it is ordered that the election petition be dismissed, and the Respondent No. 1 will get Rs. 800 as costs. The recrimination petition of the Respondent No. 1 also stands dismissed without costs.

The 16th November, 1953.

(Sd.) R. C. MITRA, Member.
16-11-53.

Order of the Tribunal.

The petition is therefore allowed with costs. The election of Respondent No. 1 to the Orissa Legislative Assembly from the Kendrapara Constituency is declared void on the ground of commission of major corrupt practices. The prayer of the petitioner that he be declared duly elected and the petition of recrimination filed by Respondent No. 1 are rejected. Respondent No. 1 will pay to the petitioner a sum of Rs. 800 as costs and petitioner will be entitled to payment of this amount out of the deposit made by Respondent No. 1 with his petition of recrimination.

(Sd.) R. C. MITRA, Member.

(Sd.) K. D. CHATTERJI, Member.

(Sd.) N. C. GANGULI, Chairman.

The 16th November, 1953.

ANNEXURE.

BEFORE THE ELECTION TRIBUNAL, CUTTACK.

ELECTION CASE No. 4 OF 1952.

Jadumanj Mangraj—Petitioner.

Versus.

Dinabandhu Sahu and others—Respondents.

ORDER No. 43 DATED 13-3-53.

We overrule the objections on the preliminary issues about maintainability and limitation. The reasons will be given in the final judgment along with other issues.

(Sd.) R. C. MITRA, Member.

(Sd.) K. D. CHATTERJI, Member.

(Sd.) N. C. GANGULI, Chairman.

The 13th March, 1953.

[No. 19/99/52-Elec.III/8789.]

By Order,
C. L. GOYAL, Asstt., Secy.